EXHIBIT B

(Redacted Copy Filed Pursuant to Paragraph 13(c) of the Stipulation and Order for the Production and Exchange of Confidential Information)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALTERRA AMERICA INSURANCE CO. et al.,

Plaintiffs,

against

NATIONAL FOOTBALL LEAGUE et al.,

Defendants.

Index No. 652813/2012E

Hon. Andrea Masley

REFEREE'S MEMORANDUM & ORDER

DISCOVER PROPERTY & CASUALTY COMPANY, et al.,

Plaintiffs,

against

NATIONAL FOOTBALL LEAGUE et al.

Defendants.

Index No. 652933/2012E

Hon. Andrea Masley

MICHAEL H. DOLINGER
DISCOVERY REFEREE:

These twin insurance coverage actions are an outgrowth of a series of lawsuits brought in 2011 against the National Football League and National Football League Properties (collectively "the League") by numerous former professional football players who claimed to have suffered brain and other neurological injuries from physical impacts sustained on the professional gridiron. The defendants sought coverage from their numerous liability insurance carriers, which led to the current litigation here, begun in 2012, over the extent of the

carriers' obligations, if any, to provide a defense or indemnify the League for defense costs and to cover liability exposure.

After an extended period of quiescence, attributable to a stay of this proceeding while the player suits were litigated, the stay was lifted, and discovery is now underway. Currently that process has triggered five motions addressed to various discovery issues, three filed by the carriers and two by the League. Following initial briefing, extended oral argument, and supplemental submissions addressed principally to claims of undue burden by producing parties, we address these motions seriatim, after offering a brief summary of the relevant background.

I. Basic Background

The players' lawsuits were consolidated for MDL purposes in the Eastern District of Pennsylvania. Before discovery responses were provided, the parties entered into settlement negotiations, which culminated in a proposed class resolution that was submitted to the District Court for approval. The court rejected the proffered settlement, which involved a payment to the class that was capped. See In re Nat'l Football League Players' Concussion Injury Litig., 307 F.R.D. 351, 363 64 (E.D.Pa. 2015). The parties subsequently presented an uncapped settlement agreement, and the court approved it, id. at 423, a ruling that was subsequently upheld on appeal by the Third Circuit. In re Nat'l Football League Players' Concussion Injury Litig., 821 F.3d 410, 420 (3d Cir. 2016). Most of the class members approved the deal, but some declined, choosing to opt out of the settlement and pursue separate suits against the League. A number of those cases are still pending. (League Prot. Order Memo at 4 5; Lechliter Prot. Order Aff. Ex. 13 at 38, para. 55).

When originally faced with the player lawsuits, the League sought carrier coverage for defense costs and, if

needed, liability. The carriers either denied liability coverage or reserved on coverage; as for defense costs, some chose to provide a portion of those costs, though none assumed the defense. (Watson Def. & Settle. Aff. paras. 4 17). The League hired its own defense counsel, although there appears to be some disagreement as to whether that was required by the carriers' refusal to assume the defense or was a tactical choice by the League in which the carriers seemingly acquiesced.

Under the relevant policies the League was required to cooperate with the carriers in their evaluation of their position, which included timely provision of details on costs of the litigation, updates on the progress of the lawsuits, and, as relevant, information on settlement negotiations. [redacted] the League entered into so called Confidentiality Agreements ("CAs") with all but one of the carriers.[1] Under the terms of the CAs, the League could proffer three categories of information to the insurers confidential information ("CI"), confidential defense invoice information ("CDII") and confidential defense strategy information ("CDSI") in fulfillment of its cooperation obligations, with the proviso that the carriers would have the option to decline the proffer of CDSI information and that

[1] The one exception -- currently Westport -- was added to the suits in question only later on, when the League belatedly discovered that Westport's predecessor had issued excess coverage policies for the period from 1968 to 1973. (League Prot. Order Memo at 16, 22-23) By that time the other parties had already signed the CAs some years before and the coverage lawsuit was already pending. Given that posture, Westport declined to execute a CA. (Id. at 23).

provision of this information to the carriers for this non litigation purpose would not constitute a waiver of any protection otherwise accorded to these categories of information. (E.g., Lechliter Prot. Order Aff. Ex. 1 at paras. 1 3, 8).

[redacted] To underscore and reinforce this position for the benefit of the League, the CAs further stated that although the information provided under the CAs could be used in possible future coverage lawsuits between the carriers and the League, it could only be used to address certain limited issues, specifically, the reasonableness of the litigation expenses and the reasonableness of any proposed settlements, and thus it could not be used with respect to whether the carriers were obliged to provide coverage. (E.g., id. at paras. 1 3). The CAs further stated that receipt by the carriers of information under the CAs that is, in a non litigation setting would not undercut the carriers' right to seek the same documents in discovery in any future litigation context. (E.g., id. at para. 10). If successful in such an endeavor, the carriers would not be limited in their use of the data, since the limits on use apply only to information provided under the CAs.

Under the protective reach of the CAs, the League did provide a flow of information to the carriers. Apparently these disclosures commonly took the form of briefings for the carriers by the League's defense counsel, sometimes followed by questions posed by the carriers, to which the League's attorneys provided follow up answers. (See, e.g., League Prot. Order Reply Memo at 6 7; Lechliter Prot. Order Supp. Aff. at para. 3 & Exs. A & B).

Ultimately some of the carriers agreed that they

would not assert lack of consent to the settlement as a basis for avoiding coverage.[2] They did not, however, concede that the settlement terms were reasonable and thus provide coverage. (League Def. & Settle. Memo at 6).

Subsequently, the carriers brought suit for declaratory relief to the effect that they were not required to provide coverage for defense costs or liability exposure. The League in turn counterclaimed for breach of the policies based on the failure to provide a defense and coverage of the settlement payments[3], and further asserted claims against some of the carriers for bad faith refusal to approve the settlement with the players as reasonable.[4]

In this litigation, the court entered a confidentiality order ("CO") on consent that, among other points, specified that the parties were to continue to comply with the terms of their respective CAs. (Lechliter Prot. Order Aff. Ex. 12 at para. 16). In the wake of that step, in 2017 the League and the carriers undertook negotiations for a possible stipulation to specify the details of how their respective rights and obligations under the CAs would be implemented in the context of the lawsuits. Those negotiations continued into July 2018, but ultimately reached a stalemate, with the parties separated on a number of issues, [redacted]

[2] These carriers included Hartford, Firemen's Fund, Munich, XL and some of the Chubb insurers. (League Def. & Settle. Memo at 6).

[3] According to the League, it has already paid out approximately $500 million under the settlement agreement. (Lechliter Prot. Order Aff. at para. 38 & Ex. 33 at 2).

[4] These included TIG, Travelers, OneBeacon, Continental and some of the Chubb insurers. (Watson Def. & Settle. Aff., Ex. 16 at paras. 94-100 (pgs. 47-48)).

[redacted]

II. The Carriers' Motion to Compel Production of The League's Defense and Settlement Documents

The carriers have moved to compel the League to produce in this litigation a vast array of documents pertaining to the MDL lawsuits that culminated in a settlement agreement approved by the trial and circuit courts. As described by the carriers, they seek "the underlying defense files generated and maintained by the NFL Parties and their common defense counsel . . . ." (Carriers Def. & Settle. Memo at 2). As also described in slightly more specific terms, the carriers are targeting "(1) the NFL's analysis of the underlying plaintiffs' claims and the NFL Parties' defenses to those claims; (2) the NFL's valuation of the underlying claims; and (3) the negotiations of the underlying settlement." (Id. See also id. at 7 8 (quoting Document Requests 28, 29, 89, 90)). The League has refused these requests, citing inter alia attorney client privilege, work product immunity, overbreadth insofar as the cited requests call for production of "all" documents that come within extremely broadly defined categories, and irrelevance. (See, e.g., NFL Def. & Settle. Memo at 14 33).[5]

In support of the insurers' motion, they make three

[5] We note that the record does not yield a precise understanding of what has been produced and not produced from the League's "defense files" and whether there are disputes as to individual documents withheld on the grounds of privilege or work-product immunity. This lacuna is attributable, at least in part, to the absence, as of the time of briefing and oral argument, of a League privilege log. Nonetheless, the arguments on both sides are sufficiently clear that we can rule on the categorical issues presented.

principal arguments.[6] After asserting the relevance of the so called defense files (Ins. Def. & Settle. Memo at 12 15), they first argue that the League has a contractual obligation to cooperate with the carriers in dealing with the underlying litigation, and that this obligation requires the League to disclose all of its defense files, including otherwise protected materials. (Id. at 16 17).[7] Next, the carriers insist that because they and the League have what is known as a common interest in minimizing exposure in the player suits, the disclosure by the League to them of otherwise protected documents would not waive the privilege or work product immunity [redacted], and hence the League has no basis to withhold those documents here. (Id. at 17 20). Finally, they argue that even if the common interest exception to waiver does not compel disclosure, the League has waived any privilege or immunity under a theory of "at issue" waiver, that is, by asserting claims for coverage and adding a claim against some of the carriers for bad faith refusal to approve the MDL settlement, it has put the contents of attorney client privileged materials and work product documents in play, and must therefore surrender those documents to the carriers. As a variant of this argument, the carriers allude to the effect of their CAs with the League, under which, they say, the League has produced a limited set of documents or other information [redacted]

[6] The insurers first assert that the documents that they have requested are highly relevant to their case. (Carriers Def. & Settle. Memo at 15-16). Although the League suggests otherwise, we assume for purposes of our analysis that at least some of the documents in the broadly defined categories sought by the carriers are potentially relevant and possibly helpful to the insurers.

[7] In the carriers' reply memorandum they state that they are not asserting that the cooperation provisions themselves mandate disclosure of otherwise protected documents. (Ins. Def. & Settle. Reply Memo at 8). Despite this representation, the carriers' original memorandum makes that precise argument, and we therefore address it here.

[redacted] and they argue that this production reflects cherry picking by the League of materials that are probably favorable to the League's position in this lawsuit, while hiding comparable documents that might favor the carriers' case. Suggesting that this selective production amounts to using the privilege and immunity as both a sword and a shield, they invoke a line of court decisions precluding such manipulative use of the privilege. (Id. at 21 25).

The League responds by rejecting each of the carriers' legal theories. It contends that the existence of a cooperation provision in a policy does not eviscerate the policyholder's privilege and work product protections as against the carrier. (League Def. & Settle. Memo at 16 17). It further asserts that, regardless of whether it and its adversaries share a common interest as defined by the carriers, that fact permits the disclosure of otherwise protected documents by the insured without waiving protection as against non parties, but does not impose on the insured an obligation to make such disclosure in a coverage lawsuit. (Id. at 17 23). As for the "at issue" question, the NFL asserts that the carriers do not satisfy the standards for invoking that form of waiver, since none of the League's claims, defenses or counterclaims here put in issue the substance of the analysis made by the League's attorneys concerning the strengths and weaknesses of the players' MDL suits or how to approach settlement negotiations.[8] The League goes on to insist that the carriers have, or will have, access to all of the materials that can inform

[8] We assume that the "defense files", to which the carriers allude, contain far more than attorney evaluations of the MDL case, but neither side goes into detail as to what else may be found in those files, and the insurers' more specific arguments about why they need access to privileged documents or work product focus on the evaluative materials, some of which we understand may have been disclosed under the CAs, and others of which have plainly been withheld.

a decision whether the failure of the insurers to cover all of the defense costs or to indemnify the League for the settlement was justified and whether some carriers acted in bad faith in declining coverage of the settlement. (Id. at 23 31). Finally, the League presses the notion that the requests, seeking "all" documents in various categories or the "entire . . . defense file", are facially overbroad and that the documents in question are not needed to address the issues that, according to the League, triggered their current demands. (Id. at 31 34).[9]

We address these issues seriatim. In doing so we assume that the target of the carriers' current motion is the set of documents that are colorably said to earn protection under the attorney client privilege or work product immunity absent the circumstances cited by the carriers.

---

[9] The cited issues, listed in the carriers' original memorandum are:

> (1) whether the NFL Parties were in possession of information reflecting historical knowledge of any risks of head trauma or efforts to conceal same from players and the public; (2) whether the NFL Parties are entitled to recover from the Insurers for payments made under the Settlement based on numerous substantive defenses to coverage, including expected or intended injury, known loss/loss in progress, misrepresentation in policy applications or late notice, to name a few . . .; (3) whether the NFL Parties are entitled to obtain reimbursement from certain insurers for all of their defense costs paid in the MDL action; (4) whether the Settlement was reasonable as to the NFL; (5) whether the Settlement was reasonable as to NFL Properties; (6) whether, with respect to certain Insurers, the NFL Parties violated the voluntary payment, consent-to-settle or other policy provisions by entering into the Settlement without prior consent; and (7) whether certain Insurers acted in bad faith by declining consent to the Settlement.

(Carriers Def. & Settle. Memo at 14-15).

A. Relevance

The carriers begin their analysis by focusing on relevance, and we do likewise. Since the carriers pitch their requests at such a steep level of generality, we are left to assume that their focus in this motion as they suggest is on documents reflecting the assessments by the League's MDL counsel, and perhaps in house counsel, of the strengths and weaknesses of the players' claims and the League's defenses in the MDL cases, as well as discussions as to the wisdom of agreeing to any settlement terms and evaluations of the progress of the settlement negotiations.[10] Arguably some of these materials would be relevant to certain factual issues raised in the coverage cases, regardless of whether the opinions of counsel themselves were admissible on questions of the reasonableness of the MDL settlement.[11] Most notably, in this context communications between client and counsel might evidence the extent of the League's early knowledge (or lack thereof) of the risks of serious brain injuries from forceful contact on the football field and what steps the League took to address or conceal the risk.

The potential relevance of such otherwise protected information is of course not determinative of whether the documents are subject to production in this case. We thus turn next to the grounds pressed by the carriers for an affirmative answer to that question.

---

[10] The carriers do not suggest that they seek documents reflecting communications between the League and coverage counsel or work product relating to the League's dealings with the carriers.

[11] As we note below, the League asserts that the standard for assessing the reasonableness of a settlement in underlying litigation is an objective one. They suggest that this means that the opinions of counsel in that litigation are either irrelevant in a coverage case or, at most, of only marginal relevance. (League Def. & Settle. Memo at 26-30).

B. The Cooperation Provisions

As noted, the carriers first invoke the cooperation provisions in the policies as justifying their demand for production of otherwise protected materials. We conclude that this is not a basis for setting aside either privilege or work product immunity.

The short answer is found in a New York appellate decision that rejected the notion that such a provision allows the carrier to invade the attorney client privilege. As the First Department observed, "the cooperation clauses in the insurance policies did not operate as waivers of plaintiff's attorney client and work product privileges." J.P. Morgan Chase & Co. v. Indian Harbor Ins. Co., 98 A.D.3d 13, 25, 947 N.Y.S.2d 17, 23 (1st Dep't 2012)(citing cases). That ruling is consistent with prior decisions in the reinsurance context in which the courts have concluded that comparable cooperation or open records provisions do not themselves amount to "a per se waiver of the attorney client privilege or work product privilege." See, e.g., Gulf Ins. Co. v. Transatlantic Reinsur. Co., 13 A.D.3d 278, 279, 788 N.Y.S.2d 44, 45 (1st Dep't 2004)(citing North River Ins. Co. v. Philadelphia Reinsur. Corp., 797 F. Supp. 363, 369 (D.N.J. 1992)).[12]

As the court in North River noted, "although the proponent of the privilege "may be contractually bound to provide its reinsurer with all documents or information in its possession that may be relevant to the underlying claim adjustment and coverage determination, absent more explicit language, it does not through a cooperation clause give up wholesale its right to preserve the confidentiality of any consultation it may have with its attorney concerning the underlying claim and its coverage determination." Id. at 369 As the court there noted, legal advice obtained by the proponent of the privilege

[12] The reinsurance context of these decisions does not provide a meaningful basis for distinguishing the current case.

"with a 'reasonable expectation of confidentiality'" will be protected. Id. (quoting Carey Canada, Inc. v. Aetna Cas. & Surr. Co., 118 F.R.D. 250, 251 (D. Del. 1987)).

There is no suggestion in the current record that the League lacked "a reasonable expectation of confidentiality" in consulting with its MDL counsel. This is particularly the case in view of the facts that (a) counsel was representing only the League and not the carriers, (b) none of the carriers offered to provide a defense and (c) the carriers either reserved on the questions of defense coverage and liability indemnification or declined coverage. Hence there is no basis for invoking the cooperation clauses from the policies as a justification for invading either the attorney client privilege or work product immunity.

C. The Common Interest Principle

The carriers next argue that they share a common interest with the League that is, minimization or prevention of any liability by the League to the players and that this common interest means that the documents in question "are not privileged as respects the insurers," and therefore must be produced. (Ins. Def. & Settle. Memo at 17). We disagree.

The common interest doctrine constitutes an exception to the rule that disclosure of an attorney client communication to an outsider will waive the protection of the privilege with respect to the rest of the world. In instances in which the client and another share a legal interest in anticipated or pending litigation, they may share with each other their separate communications with their common or separate counsel "for the purpose of furthering a common legal interest". See Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d 616, 625, 626, 36 N.Y.S.3d 838, 843 (2016). This doctrine thus is intended to facilitate the voluntary disclosure to another by an actual or prospective party to litigation, based on the premise that, at the time of the disclosure,

the two shared the requisite common interest. Id. at 628 29, 36 N.Y.S.3d at 845. The limiting premise is that the exception to waiver will not apply if the disclosure is made to someone who does not have the required common interest at the time of disclosure. See, e.g., People v. Osorio, 75 N.Y.2d 80, 85, 550 N.Y.S.2d 612, 614 15 (1989).

The carriers' argument for reading this doctrine as a rule mandating disclosure by a party to another person based on their asserted common interest is incompatible with the rationale for, and substance of, the doctrine. As the New York Court of Appeals has observed, "the doctrine itself is not an evidentiary privilege or an independent basis for the attorney client privilege. Rather, it limits the circumstances under which attorneys and clients can disseminate their communications to third parties without *waiving* the privilege." Ambac, 27 N.Y.3d at 630, 36 N.Y.S.3d at 847 (emphasis in original). In short, the space for disclosure created by the common interest rule is designed to permit a client to serve his interest and that of another by choosing disclosure.

In this case, the carriers' paradigm fails in multiple respects. It would coerce the holder of the privilege to involuntarily surrender its protected documents, rather than facilitating a disclosure that the holder wished to accomplish to further a common interest. Moreover the proposed mandated disclosure would occur at a time when the would be recipients are in direct litigative conflict with the holder of the privilege, as reflected in the pleadings in this coverage lawsuit. In addition, and most striking, is the fact that the forced surrender would be for the specific purpose of assisting the recipients of the protected documents in pursuing their claims and defenses against the holder of the privilege rather than serving their common interest.

Not surprisingly, the New York courts have not been particularly receptive to the carriers' theory. As the First Department has noted, "there [i]s no automatic

waiver of the attorney client privilege merely because the parties ha[ve] a common interest in the outcome of the underlying litigation. Production of documents under those circumstances does not prevent the assertion of privilege [for] similar documents in an adversary situation." Gulf Ins. Co., 13 A.D.3d at 280, 788 N.Y.S.2d at 46 (citing North River Ins. Co., 797 F. Supp. at 39). Accord American Reinsur. Co. v. United States Fid. & Guar. Co., 40 A.D.3d 486, 491, 837 N.Y.S.2d 616, 621 (1st Dep't 2007); J.P. Morgan Chase & Co. v. Indian Harbor Ins. Co., 2011 BL 209742, *3 (Sup. Ct. N.Y. Cty. May 26, 2011), aff'd, 98 A.D.3d 13, 947 N.Y.S.2d 17 (1st Dep't 2012).

In this case the carriers point to the common interest in the outcome of the players' lawsuits and seek to diminish the significance of the "adversary situation" between them and the League. In doing so they argue that "a tripartite relationship exists between the Insurers, the NFL Parties, and Paul Weiss (or any other retained defense counsel) that is rooted in their common interest in the defense of the MDL Action". (Ins. Def. & Settle. Memo at 17). That is the sum total of the factual basis of their theory for invading the privilege. But that posture is inconsistent with the Appellate Division's observation in Gulf that "a common interest in the outcome of the underlying litigation" does not justify invading the privilege. Moreover, the fact that the League disclosed some documents or other information to some of the carriers in fulfillment of its cooperation obligation also does not demonstrate the sort of relationship that might justify setting aside the privilege or work product immunity, as Gulf and American Reinsurance, 40 A.D.3d at 491 92, 837 N.Y.S.2d at 621 22, also make plain. Indeed, in the latter case the court observed that a common interest would be found for this purpose only if there was "dual representation []or a joint defense or strategy." Id. at 491, 837 N.Y.S.2d at 621.

Given the carriers' emphasis on the notion that they

were sufficiently intimately involved in the MDL cases, they might be heard to assert that the privilege cannot be invoked because at the time of the attorney client communications, the League could not have had a reasonable expectation of confidentiality in its discussions with Paul Weiss. Indeed, this notion is at least implicit in one of the decisions that they invoke, Royal Indemnity Co. v. Salomon Smith Barney, Inc., 2004 WL 1563259 (Sup. Ct. N.Y. Cty. June 29, 2004). In that case the court ordered partial production, coinciding with the period until disclaimer of coverage, but in doing so it noted that the carrier had actively participated in the defense of the underlying lawsuit, including participation in settlement negotiations with the insured, its attorneys and its primary carriers. Id. at *6.[13]

Even if the reasoning in Royal is still legally sound,[14] the facts of record here are quite different. Given the refusal of the carriers to offer a defense although some agreed to pay a portion of defense costs and their reservation of rights or outright rejection of any liability coverage obligation, the League can scarcely be charged with unreasonably assuming the confidentiality of its communications with its own

[13] The carriers also cite Maryland Cas. Co. v. W.R. Grace & Co., 1994 WL 592267, *6-7 (S.D.N.Y. Oct. 26, 1994), but that decision is not helpful to their cause. The court there upheld a decision by a Magistrate Judge to adhere to a 1987 discovery ruling requiring production based on common interest, while noting that the pertinent law in New York may have been altered by a more recent decision in the First Department, United States Fire Ins. Co. v. Phoenix Assur. Co., 193 A.D.2d 559, 598 N.Y.S.2d 938 (1st Dep't 1993)(rejecting common-interest assertion for lack of joint counsel). The District Court rested its ruling on the long-term reliance of all parties on the 1987 decision, even while expressing doubt as to its fidelity to current New York law.

[14] Arguably, the First Department decisions cited above, which post-dated Royal Indemnity, call its analysis into question.

separate attorneys. See, e.g., American Reinsur. Co., 40 A.D.3d at 491 92, 837 N.Y.S.2d at 621 22 (sending reports to carrier and engaging in strategy talks with it does not waive privilege or demonstrate a common interest basis to invade the privilege, where the carrier did not actively participate in the underlying litigation).[15] See also Carey Canada, Inc., 118 F.R.D. at 251 52 (finding expectation of confidentiality since carrier's obligation to indemnify was still in dispute).

In sum, on the current record the common interest doctrine does not justify invasion of the attorney client privilege of the League or the work product immunity that it currently asserts.

D. At Issue Waiver

The carriers' remaining argument in their original memorandum rests on the assertion that, by virtue of the League's claims and defenses in this case, it has put in issue some or all of its defense file, although they principally target the assessments of the MDL claims and defenses by the League and its counsel, as well as their evaluations of settlement positions and the final MDL settlement. A careful reading of the pertinent caselaw indicates that this argument cannot prevail in the current state of this lawsuit, although future development might conceivably alter that outcome.

As an alternative, if related, argument the carriers

[15] The court in American Reinsurance noted the difference between cases involving the insured and primary insurer and those involving disputes between the primary carrier and a reinsurer. 40 A.D.3d at 491, 837 N.Y.S.2d at 621, but that difference was pertinent only to the court's point that a common interest would be found only if there was either dual representation of the two parties or "a joint defense or strategy." As the Court there noted, joint representation was less likely in the reinsurer case since the primary insurer was obliged to provide a defense for the insured. In short, the distinction that the Court there noted does not aid the carriers' position here.

also press the notion that the League has engaged in selective disclosure of materials reflecting such analyses, and that the inherent unfairness of this pattern characterized by the carriers as the impermissible use of the attorney client privilege as a sword and a shield justifies invading the privilege. This argument also falls short on the current record.

To evaluate the at issue point, we start with a snippet of history. The most common traditional articulation of this theory of waiver is found in Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975), which concluded that the application of this form of waiver depended upon the positive answer to three questions whether "(1) assertion of the privilege was a result of some affirmative act, such as filing suit"; "(2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense." See id. at 581.

Although long followed by both state and federal courts, this formulation has the disadvantage that, if literally applied, it could broadly undermine the privilege. As observed in an early law review article, "[T]he faults in the *Hearn* approach are (1) that it does not succeed in targeting a type of unfairness that is distinguishable from the unavoidable unfairness generated by every assertion of the privilege, and (2) that its application cannot be limited." Note, *Developments in the Law Privileged Communications,* 98 Harv. L. Rev. 1450, 1641 42 (1985). See also Richard L. Marcus, *The Perils of Privilege Waiver and the Litigator*, 84 Mich. L. Rev. 1605, 1628 29 (1986). That problem has been echoed more recently by the Second Circuit in its observation as to the fundamental weakness of the Hearn formulation. After noting that the assertion of an advice of counsel defense was a "'quintessential example' of an implied waiver of the privilege", In re County of Erie, 546 F.3d 222, 2228 (2d Cir. 2008)(quoting In re Kidder Peabody Secs. Litig.,

168 F.R.D. 459, 470 (S.D.N.Y. 1996)), the court went on to conclude:

> We agree with its critics that the *Hearn* test cuts too broadly. . . . According to *Hearn*, an assertion of privilege by one who pleads a claim or affirmative defense "put[s] the protected information at issue by making it relevant to the case. *Hearn*, 68 F.R.D. at 581. But privileged information may be in some sense *relevant* in any lawsuit. A mere indication of a claim or defense certainly is insufficient to place legal advice at issue.

Id. at 229 (emphasis in original). Having rejected the Hearn formulation, the circuit court held that to invoke at issue waiver, "a party must *rely* on privilege advice from his counsel to make his claim or defense." Id. (emphasis in original).

Strikingly, the year before County of Erie was decided, the First Department arrived at essentially the same result. In a lawsuit involving claims for indemnification and a question as to the reasonableness of a prior settlement, the court addressed the demand of the indemnitors to extract attorney client documents from the indemnitee Deutsche Bank on the basis of an at issue theory. Deutsche Bank Trust Co. v. Tri Links Inv. Trust, 43 A.D.3d 56, 837 N.Y.S.2d 15 (1st Dep't 2007). The indemnitors' contention was that the Bank had placed in issue the advice of its attorney in the underlying action inasmuch as it had to prove (1) that the amounts it had expended in the prior action were reasonable and (2) that it would have been held liable if that lawsuit had been litigated to verdict rather than settled and (3) that the settlement terms were reasonable. Id. at 62, 837 N.Y.S.2d at 22 23. The court determined that the claims, defenses and issues in question did not trigger at issue waiver.

In addressing the relevant criteria, the court first reiterated the general nostrums that derive from Hearn, stating that "[a]t issue waiver occurs where a party

affirmatively places the subject matter of its own privileged communication at issue in the litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive its adversary of vital information." Id. at 63 64, 837 N.Y.S.2d at 23 (citing cases). Having so articulated the basic premise for the waiver rule, however, the court went on to define more precisely the core requirement for its invocation:

> Of course, that a privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself "at issue" in the lawsuit; if that were the case, a privilege would have little effect. . . . **Rather, at issue waiver occurs "when the party has asserted a claim or defense that he intends to prove by use of the privileged materials".**

Id. at 64, 837 N.Y.S.2d at 23 (quoting North River Ins. Co. v. Columbia Cas. Co., 1995 WL 5792, *6 (S.D.N.Y. Jan. 5, 1995)(emphasis added)). Accord, e.g., Manufacturers & Traders Trust Co. v. Servotronics, Inc., 132 A.D.2d 392, 397, 522 N.Y.S.2d 999, 1003 (1st Dep't 1987)(at issue waiver unavailable if privilege holder "does not need the privileged documents to sustain its cause of action").

The court then proceeded to note that the Bank had placed in issue at least the reasonableness of the amounts that it had spent in defense costs and the reasonableness of the settlement terms. That said, however, it concluded that Deutsche Bank did not need to rely on the advice of its counsel to carry its burden on either of these issues. Deutsche Bank, 43 A.D.3d at 64 65, 837 N.Y.S.2d at 24. In support of that conclusion, the court noted the plethora of information that was available or potentially available to the parties on these issues, thus demonstrating that resort to attorney

client privileged information was not necessary. Id. at 65 66, 837 N.Y.S.2d at 24. It further noted that even if the Bank was required to prove its own liability in the underlying case and the reasonableness of the settlement, it had represented to the court that it would not rely on privileged or work product materials in doing so. Id. at 65, 837 N.Y.S.2d at 24.

In this case the current record does not satisfy the recognized test for an at issue waiver. The League does not propose to rely for its claims or defenses on the advice or evaluations of its attorneys. Indeed, it argues that since the appropriate test for determining the reasonableness of the settlement is an objective one, its counsel's views about it are irrelevant. (League Def. & Settle. Memo at 26 31).[16]

In seeking to avoid this conclusion, the carriers argue that they need access to these attorney evaluations principally because there is little other evidence as to the arguable bases for the League's decision to settle on such generous terms. This argument fails for several reasons.

First, insofar as the argument rests on the asserted needs of the carriers, it fails to meet the explicit requirement in Deutsche Bank that waiver can be triggered only by the need for the privilege holder to use privileged material in support of its claims or defenses.[17] As noted, the League currently eschews any

[16] At one point the League also asserts that in any event the carriers cannot challenge the reasonableness of the MDL settlement because it was reviewed and approved by both the District Court and the Third Circuit. (League Def. & Settle. Memo at 26). We offer no comment on that assertion since it is both beyond our remit -- in effect, a ruling on that question would purport to determine the merits of one major part of this case -- and because it is unnecessary to our decision.

[17] Although, as we noted, the Appellate Division discussed the adequacy of the non-privileged evidence for both sides, we

such reliance.

Moreover, the carriers fail to demonstrate that the privileged materials are essential for them to respond to the League's expected case or for the court to be able to assess the reasonableness of the settlement. We start by noting that there appears to have been a significant record before the MDL court on the motion for approval of the settlement, including reports of medical experts and medical records pertaining to alleged gridiron brain injuries and causation. In addition, the insurers are entitled to conduct both documentary discovery and depositions here addressed to what knowledge the League had, and when, concerning the neurological effects of physical collisions typically encountered on the football field (and potentially in other sports). In that regard, although the carriers complain that much of the document production to date by the League has offered little information on these questions, the adequacy of such production is an issue in two parallel motions here awaiting decision, and in any event it appears that non party discovery particularly that addressed to former members of various League medical committees is likely to bear fruit.[18]

Finally, although the carriers further argue for access to privileged materials because the MDL settlement was reached before documents were produced or witnesses were deposed in those cases, that argument misses the

---

read its holding as resting squarely on the requirement that, for waiver, the privilege holder must need to utilize privileged communications on its case. Accord County of Erie, 546 F.3d at 229.

[18] In apparent response to this point, the carriers complain that the League has placed obstacles in the path for obtaining non-party responses to subpoenas. (Carriers Def. & Settle. Reply Memo at 18-19). We have been presented with no specifics, and the carriers have not sought court intervention to ease their access to this information. Generalities of this sort do not affect our analysis of the current motion.

mark. In effect the carriers are complaining that the absence of MDL discovery deprives them of needed information, but the disclosure of attorney advice is not needed to deal with that fact. By settling before discovery, the League made a tactical choice, and the carriers will be free to point to that arguable haste as evidence undercutting the reasonableness of the settlement. In addition, if the carriers believe that MDL discovery would have produced information that would undercut the reasonableness of the settlement, they may seek to undertake comparable, if targeted, non party discovery to test that proposition.

E. The Fairness Issue

Related to the carriers' at issue analysis, they press an argument to the effect that the League is engaging in the improper tactic of disclosing to the carriers selected portions of [redacted], supposedly choosing to reveal only those that support the League's position in this lawsuit and concealing other documents that might undercut the League's demand for coverage. This assertion, in substance that the League is using the privilege as "a sword and a shield", rests on disclosures that the League has made to the carriers in the non discovery context of their pre suit confidentiality agreements. According to the carriers, the appropriate remedy for this misfeasance is to set aside the privilege and work product immunity so that the carriers can see all materials reflecting the full range and evolution of [redacted] (See Ins. Def. & Settle. Reply Memo at 17 18).

There are several problems with this argument. First, the disclosures made under the CAs are governed by the terms of those agreements, and they specifically provide that the disclosure by the League to the carriers of selected documents will not oblige the League to produce any others and will not be deemed a waiver of the privilege or work product protection. (Lechliter Prot. Order Aff. Ex. 1 at paras. 3(a), 8, 10). Second,

consistent with the decisional law governing at issue waivers, even if the disclosures to which the carriers point had been made in discovery and without the benefit of the protective provisions of the CAs, the result would not change. The unfairness that underlies the court's authority to find an implied subject matter waiver rests on the practical damage to a litigant if its adversary provides and uses only favorable documents and conceals damaging ones. That injury turns solely on the impact on the ultimate decision maker, whether the court on summary judgment or the trier of fact at trial. Both the Appellate Division and the Second Circuit have made clear that disclosure of the advice of counsel during discovery will not, by itself, trigger a waiver. Thus, in County of Erie, the circuit court noted that a witness for the county had begun to testify at his deposition about the advice of counsel before his attorney cut him off. As the Court of Appeals noted, that does not mean that the County placed the advice of counsel "in issue", but it also observed that "the fact that the deponent was not before a 'decisionmaker or factfinder' when he made the statements claimed by Respondents to have triggered the waiver means that Respondents have not been placed in a disadvantaged position at trial." 546 F.3d at 230 (quoting In re Sims, 534 F.3d 117, 132 (2d Cir. 2008).

To similar effect, the Appellate Division in Deutsche Bank noted deposition testimony by a witness for the Bank describing attorney advice and stating that the Bank had relied on that advice, and yet the court ruled that such deposition testimony does not waive the privilege. Deutsche Bank, 43 A.D.3d at 68 69, 837 N.Y.S.2d at 25 27 (quoting Soho Generation of N.Y. v. Tri City Ins. Brokers, 236 A.D. 2d 276, 277, 653 N.Y.S.2d 924, 925 (1st Dep't 1997); Miteva v. Third Point Mgt. Co., 218 F.R.D. 397, 397 98 (S.D.N.Y. 2003)). The court then went on to emphasize that the Bank had "never, either through counsel or through Cohen's testimony, stated an intention to use the advice of counsel to prove the reasonableness of the WMI settlement, and it now explicitly disclaims any such intention." Id. at 69, 837 N.Y.S.2d at 27.

Here, as noted, the League has never suggested that it would use the advice of counsel to support its claims or defenses. Moreover, it has argued that such evidence would be irrelevant. Thus, the limited disclosure to the carriers, in a non discovery context, [redacted] does not trigger waiver of protection for the attorney client and work product materials currently being withheld, insofar as they contain communications about, or discussion of, [redacted]

F. Issues Not Addressed Here

In resolving the current motion to compel, we note several matters that we have not addressed, as they are either not directly raised by the motion or the League's response or else are not ripe for decision.

1. As we have noted, as of the time of oral argument the League had not yet served a privilege log. Thus the record is not adequate to judge any possible challenges to the invocation of privilege or work product immunity for any specific documents.

2. The current motion targets documents reflecting counsel's assessments, whether they are withheld under the attorney client privilege or as work product. Unlike the privilege, work product protection even if otherwise applicable may be overcome on an adequate showing of need. See, e.g., CPLR sec. 3101[d][2]; Spectrum Sys. Int'l Corp. v. Chemical Bank, 78 N.Y.2d 371, 376 77, 575 N.Y.S.2d 809, 813 (1991); American Re, 40 A.D.3d at 490, 837 N.Y.S.2d at 620 21. We do not read the carriers' motion as seeking to satisfy that requirement, at least explicitly,[19] and we are not ruling on such an hypothesized argument, which should in any

[19] We note that the carriers' argument regarding at-issue waiver roughly parallels the analysis required in a challenge to work-product protection that is based on a showing of need.

event await the service of a privilege log.

3. In rejecting the carriers' argument for at issue waiver, we have relied on the record as it currently stands. If relevant circumstances change so as to suggest that the League is planning to utilize privileged documents or testimony about counsel's assessments of the MDL cases or the settlement, we will be prepared to re examine the question of at issue waiver.[20]

G. Conclusion

The carriers' motion to compel production of defense and settlement documents (the so called defense file) is denied.

III. The League's Motion for a Protective Order

The League has filed a motion seeking what it deems a protective order. In substance, this application seeks to resolve a series of disputes with the carriers as to the meaning of several terms from the eleven currently operative CAs, the practical application of those CAs, and whether one carrier (counterclaim defendant Westport Insurance Corporation) may receive the information previously provided to other carriers under their CAs but without the necessity of entering into its own CA or being bound by the terms of those CAs. The principal areas of controversy concern (1) whether the League may use CDSI in this lawsuit without possible waiver of protection for privileged or work product material,[21] (2)

[redacted]

[21] The motion seeks relief with regard to CI and CDII as well as CDSI, but the carriers' responses actually address only the

whether CDSI to be provided in the future is to be governed by the non waiver rules of the CAs, (3) whether the references in the CAs to permissible litigation uses of CDSI exclude other such usages, and (4) whether Westport may be denied access to CDSI unless it binds itself, or is bound by the court, to comply with the use limitation and non waiver provisions found in all of the extant CAs.

We first address the disputes between the League and the collective carriers, and then separately address the Westport imbroglio.

A. Background: The CAs and the CO

The context for this motion stretches back to 2011, when the player suits were first filed. As noted, none of the carriers conceded coverage, either for defense expenses or for liability exposure, although a number of them agreed to pay a portion of the League's defense costs. Under the cooperation provisions of the various policies, the carriers wanted information from the League that was pertinent to the basis for payment of claimed defense expenses, including attorney fees; evaluations of the claims and defenses; the course of settlement discussions; and evaluations of potential settlement terms. Since much of this information was likely to be protected by the attorney client privilege and work product immunity, the carriers agreed to the League's demand that they each enter into the various parallel CAs, the terms of which have been briefly alluded to above. See pp. 3 4, supra. [redacted]

CDSI. (See Carriers Prot. Order Memo at 4-7 & passim. See also Tr. 132).

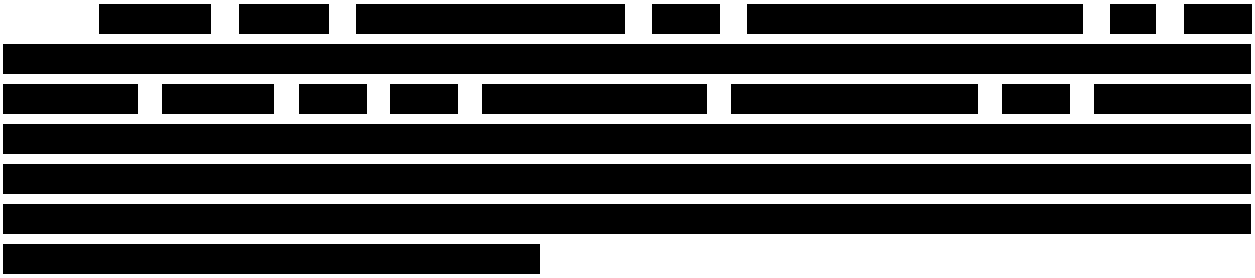
[redacted]

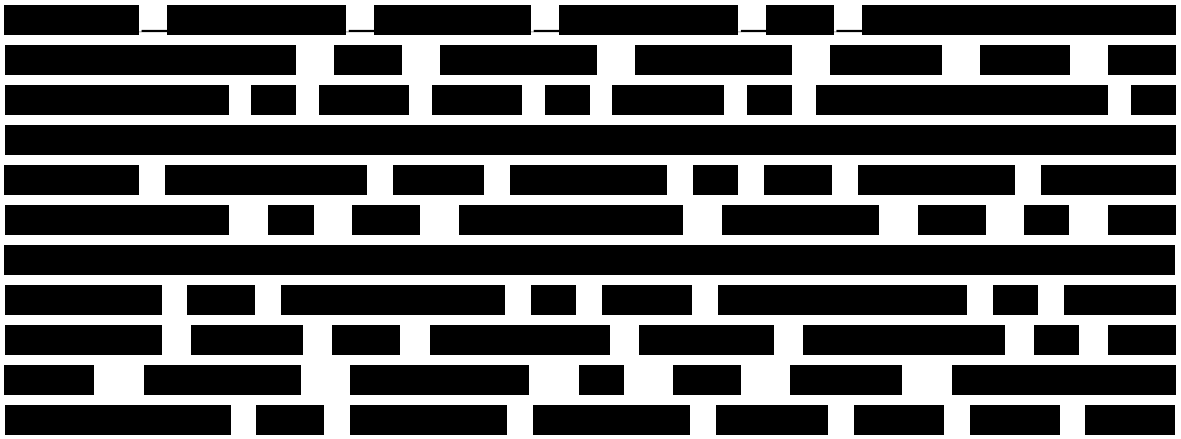
The CAs specified that the information in question whether CI, CDII or CDSI was being provided to the carriers for limited purposes, described somewhat differently for each of the three categories of information. Thus for CI, the provision of this information was solely for the purpose "of evaluating and providing comments and/or consent to Policyholder in connection with the defense and/or resolution of the Underlying Claims, for evaluating the handling of the Underlying Claims, or for the purpose of determining whether or not there is insurance coverage for amounts incurred or paid in connection with the defense and/or resolution of the Underlying Claims." (Lechliter Prot. Order Aff., Ex. 1 at para. 1).[22] For CDII, the carriers were limited to using it "for the purpose of evaluating the reasonableness or necessity of defense costs and for determining whether or not the Insurers are obligated to provide reimbursement for such fees and costs." (Id. Ex. 1 at para. 2). As for CDSI, the CAs provided that, before producing the information, the League was to advise the carrier of its general nature and was to produce it if the carrier consented. In that case the carrier was limited to using CDSI "for the purpose of evaluating and providing comments and/or consent to Policyholders in connection with the defense and/or resolution of the Underlying Claims through settlement." (Id. Ex. 1 at

[22] The League has provided all eleven extant CAs in its motion papers. (See Lechliter Prot. Order Aff. Exs. 1-11). Since these agreements are substantively the same (see Tr. 141), we cite only to Exhibit 1, which is the CA entered into by TIG Insurance Company, U.S. Fire Insurance Company and the North River Insurance Company.

para. 3(b)).[23]

These same three paragraphs also explicitly permitted both the carriers and the League to "use" the same covered information in any future coverage lawsuit, although both CDII and CDSI could be used in such a context only for limited purposes. Thus CDII could be used "for the purpose of resolving a dispute regarding whether fees and costs incurred in connection with the Underlying Claims are reimbursable under the Policies." (Id. Ex. 1 para. 2). As for CDSI, it could be used in a "litigation of a dispute between Policyholders and Insurers relating to the reasonableness of the defense or settlement of the Underlying Claims." (Id. Ex. 1 at para. 3).





[23] The quoted paragraph went on to emphasize the limits of this authorization by stating that CDSI "may not be used by Insurer Parties for any other purpose, including but not limited to evaluating whether or not insurance coverage is available for Underlying Claims." (Id. Ex. 1 at para. 3(c)).

[redacted]

With the exception of the last quoted sentence from paragraph 8, the parties further agreed that the CAs did not affect their ability to assert their respective claims of right in connection with either discovery obligations or obligations to cooperate under the relevant policies. Thus, in coverage suits the carriers were free to pursue the same information covered by the CAs through discovery procedures and thus to argue that CI, CDII and CDSI were not covered by privilege or the work product doctrine, just as the League was free to argue to the contrary. Similarly, the carriers were free to argue that they had a right to see additional information under the policies or by way of regular discovery, and the League was free to assert the opposite. (Id. Ex. 1 at para. 10).

Finally, insofar as CI, CDII or CDSI were to be used in coverage litigation, the parties agreed "to use their best efforts to put in place and/or obtain appropriate confidentiality agreements and/or orders to maintain the confidential nature of the CI", CDII or CDSI. (Id. Ex. 1 paras. 1 3).

Following the filing of the various carrier suits, the parties negotiated and agreed upon the terms for a court ordered Confidentiality Stipulation and Order. (Id. Ex. 12). Among other provisions, that order stated that "to facilitate the confidential and secure exchange of information outside of the litigation setting, the NFL parties have entered or may enter into confidentiality agreements with a number of their insurers . . .", and it went on to provide that

This Order does not modify, diminish or supercede, and

> the parties to such agreements shall continue to comply with, the provisions, restrictions, and protections of those Non Litigation Confidentiality Agreements, including without limitation the terms of such agreements limiting the permitted uses of such documents and information and the persons or entities to whom such documents and information may or may not be disclosed.

(Id. Ex. 12 at para. 16).[24]

B. The Motion

Following the lifting of a lengthy stay, the parties in this proceeding attempted to negotiate a stipulation to govern the details of the use in litigation of CI, CDII and CDSI. Ultimately they reached a stalemate that appeared to focus on two main issues. The first was whether the League could use the documents and other information deemed to be CDII or CDSI in this lawsuit without facing a claim by the carriers that such use itself waived protection for other materials. The second was whether the non waiver terms of the CAs would extend to documents provided in the future by the League.

With the parties in stalemate, the League has moved

[24] Paragraph 16 of the Confidentiality Order went on to reiterate the representations found in the CAs (e.g., Lechliter Prot. Order Aff. Ex. 1 at para. 10) to the effect that the carriers retained the right to seek CI, CDII and CDSI and other materials by discovery, even if some or all had already been produced under a CA, and the League retained the right to argue in such discovery litigation that this information was protected by privilege or work-product immunity. This provision also reiterated that if the carriers intended to use such materials in the litigation, "they will first work cooperatively with the NFL Parties to agree on procedures for such use that are consistent with the non-disclosure, non-waiver, use, and any other limitations set forth in the Non-Litigation Agreement and, failing such agreement, will permit the NFL Parties a reasonable opportunity to pursue judicial relief before attempting to use any such document or information."

for a protective order to uphold its interpretation of the parties' respective rights and obligations under the CAs and the CO. In substance, it seeks a ruling that it is permitted to use the CI, CDII and CDSI in this case without a waiver, just as the carriers may do. It further asks for confirmation that the CAs will continue to apply to future productions by it to the carriers for purposes of meeting its obligation to cooperate with the insurers. In addition, it asks us to reject a contention by the carriers asserted in their opposition that the reference in the CA to the specific purposes for which CDSI may be used in coverage litigation does not constitute a restriction on usage, but rather an open ended invitation to make unlimited use of that material. (League Prot. Order Memo at 24 34; League Prot. Order Reply Memo at 5 17).

The carriers, focusing solely on CDSI, oppose the motion on a number of grounds. First, they note that they have separately moved to compel production of so called defense and settlement documents on the basis that they are not protected by a privilege or work product immunity, either ab initio or because these protections have been waived by the League's assertions on the merits of these lawsuits that is, at issue waiver. Assuming the success of that motion, the carriers assert that the League's protective order motion would be moot. (Carriers Prot. Order Memo at 2, 14 18). Second, the carriers contend that the CAs were not intended to address litigation and furthermore, as worded, they protect against possible privilege waiver by CDSI only with respect to the "provision" or "disclosure" of the data to the carriers and not if the League uses the data in a coverage lawsuit. (Id. at 18 21). Third, they argue that to read the CAs otherwise would allow the League to cherry pick documents favorable to its position, hand them to the carriers under the CA, and thus use the CA process to escape the normal consequences of such conduct under the so called sword and shield doctrine, a tactic deemed impermissible in litigation, and highly prejudicial to the carriers. (Id. at 21 22). The carriers

also argue at one point that the CAs, while specifying what uses may be made of the data provided under the CA, do not restrict the use that may be made of them by the carriers, but rather only illustrate two of those uses. (Id. at 23 24).

Finally, the carriers also seem to take the position that the provisions of the CAs limiting the uses of CDSI and protecting against waivers should be deemed only backward looking and should therefore not apply to any future CA disclosures by the League. (Id. at 14. See also Lechliter Prot. Order Aff. Ex. 23B at para. 3).

C. Assessments

1. Can the League Use CDSI in Litigation Without Facing Any Waiver Argument?[25]

In attempting to negotiate a stipulation with the carriers, and in the current motion, the League has taken the position that under the CAs it is free in the coverage litigation to use the protected information, including CDSI, that it had provided to the carriers and that it can do so without any argument by the carriers that its use of that information constituted a waiver of the privilege or work product immunity vis a vis the carriers. The carriers have disagreed, noting that the language of the CAs did not explicitly so provide, and arguing that to so interpret the CAs would allow the League to selectively disclose information to the carriers that was favorable to the League's position, while withholding equivalent unfavorable information. According to the carriers, such a posture would deprive them of their ability to protect against their adversary using the privilege and work product immunity as a so called sword and shield, which was not the intent of the

[25] As noted above, the carriers first argue that the League's motion should be deemed moot if they prevail on their own motion for access to the League's defense files. For reasons that we have explained, that motion is being denied. See p. 25, supra.

CAs. On this issue we conclude that in one narrow respect the League could face a waiver application based on its affirmative use of CDSI in the lawsuit.

The pertinent language, found in paragraph 8 of Exhibit 1, states that "[t]he Insurer Parties agree that they will not assert that the provision by Policyholders of any [CI, CDII or CDSI] constitutes a waiver of any of Policyholders' rights or privileges with respect to any such information or any other information." This wording speaks solely to "the provision" of CDSI to the carriers as being immunized from any waiver argument by the carriers. This is consistent with other terms of the CAs that specifically provide that, in fulfilling its non litigation cooperation obligation, the League is free to choose what information to share with the carriers, and that its "provision" of certain information in this manner does not entitle the carriers to obtain any other information in that non litigative context, even as the carriers retain the right to seek whatever information they wish including previously provided CDSI via discovery in the lawsuit.[26]

Since paragraph 8 refers solely to "provision" and not "use" of CDSI, as protected from a waiver argument, the question arises as to the basis for the League's argument that its use of CDSI is also granted a non waiver shield. The arguments that the League principally presses are, variously, thematic, textual, contextual and practical in nature, though none is ultimately persuasive.

The thematic point turns on the facts (1) that the CAs allow both the League and the carriers to use CDSI in coverage litigation, with certain specified limitations, (2) that the CAs give the League the right to provide

[26] By virtue of this dual-track option for the carriers, they retain the possibility of avoiding the limitations that the CAs imposed on their use of CDSI, if they also obtain access to the same materials in discovery.

whatever information it deems appropriate (subject to the carrier veto) without triggering an obligation of further disclosure, [redacted] The League then suggests that these provisions would be inconsistent or at least in tension with a reading of paragraph 8 under which the League's limited use of CDSI in coverage litigation could expose it to a potential privilege waiver despite its compliance with the explicit CA terms governing disclosure to the carriers.

The League's reliance on this general theme does not meaningfully advance its case. The argument made by the carriers, if adopted, could potentially impact the scope of disclosure to the carriers, [redacted] Indeed, the terms of the Confidentiality Stipulation and Order reinforce the requirement that whatever protected materials the carriers receive must be shielded from further disclosure, [redacted]

The League's textual argument seeks to equate the term "provision" (and alternatively "disclosure") in paragraph 8 with the word "use". In effect, the League suggests that the word "provision", when used in that paragraph, is shorthand for "provision and/or use". To justify that result, the League asserts that even though, under paragraphs 1 3 and 10, the terms "provision", "provide", "produce" and "disclosure" explicitly refer only to the handover of information that is, its provision to the carriers in a non litigative context and not its use by the League in litigation the subsequent use of that information by the League in litigation would require that it provided (or disclosed) that material to

the carriers a second time. With this premise secured, the League asserts that there is nothing in the CA that limits the non waiver protection to the League's first provision of the information to the carriers. In short, it argues that use of CDSI in a motion or at trial constitutes a second (or perhaps a third) provision or disclosure of the CDSI to the carriers, and each such provision or disclosure is protected from sword and shield (or indeed any) waiver. This argument stretches the bounds of plausibility.

A careful reading of the CA allows for the conclusion that its drafters used the terms "provision" and "disclosure" interchangeably. (See, e.g., Lechliter Prot. Order Aff. Ex. 1 at para. 8). Equally clear, however, is the evident fact that the drafters did not do so with respect to the term "use".

The CA recognizes two different procedural stages in which its rules come into play. The first is the non litigative process by which the League chooses to provide (or disclose) some information, of varying types, to the carriers as part of its effort to cooperate, a process that is designed to allow the carriers to assess whether coverage is warranted and to what extent. The CA then, as a separate matter, authorizes both the carriers and the League to "use" that same material for specifically limited purposes in any coverage litigation. In short, the invocation of the terms "provision" and "disclosure" is exclusively found in connection with the non litigative stage in which the League may hand over CDSI to the carriers, whereas the term "use" refers solely to the actions allowed to each side in the context of a lawsuit. This distinction is of course consistent with the common understanding of these terms, and there is no indication in the CA that the drafters intended to conflate "provision" or "disclosure" with "use" in this context.[27]

[27] In common understanding, if the League intended to use the CDSI in litigation, that use would involve provision or

The League's argument on this point also elides the fact that it is seeking protection, not for second round provision of protected materials to the carriers, but rather for its own reliance on that material in arguing to the decision maker for a favorable outcome on its claims and defenses. In short, the "use" of the material is conceptually distinct from its provision (or disclosure). It is that distinct act that is not accounted for in paragraph 8 by the use of the term "provision".

In the League's reply papers, it offers a secondary textual argument in support of the same proffered conclusion. It quotes a portion of what is paragraph 3 of Exhibit 1 providing that CDSI "may be used in a . . . litigation . . . of a dispute between Policyholders and Insurers *relating to the reasonableness of the defense or settlement of the Underlying Claims*" and argues that the carriers' reading of paragraph 8 would render the italicized language "mere surplusage", in violation of a long recognized canon of contractual interpretation. (League Prot. Order Reply Memo at 14 (citing Westview Assocs. v. Guaranty Nat'l Ins. Co., 95 N.Y.2d 334, 339, 717 N.Y.S.2d 75, 77 (2000)). This argument does not withstand scrutiny. It seems to assume that under the carriers' reading, there can be no defense to the carriers' acquisition of CDSI in discovery. If so, the carriers would be free to use this material without the limitations specified in paragraph 3. That apparent assumption is groundless.

The carriers' reading leaves the quoted limitations on use intact except if they can show a basis for waiver. Use alone by the League cannot satisfy the requirements for a waiver, since that would conflict with the

---

disclosure of the material to the judge or the jury, but would scarcely be understood to encompass disclosure or provision to the carrier, which necessarily already had been provided with the material in the non-litigative process of informational disclosures.

paragraph 3 provisions, which allow use by the League and define use limits for both sides. (Lechliter Prot. Order Aff. Ex. 1 at para. 3). Waiver might be achieved if the carriers could meet the requirements for invoking the "sword and shield" doctrine, see generally In re Grand Jury Proceedings, 219 F.3d 175, 182 (2d Cir. 2000); In re Symbol Technologies, Inc. Secs. Litig., 2017 WL 1233842, *9 10, 15 17 (E.D.N.Y. March 31, 2017)(citing cases), but not otherwise.[28] In the absence of any demonstrated sword and shield withholding of information, the parties would be bound by the limitations on use specified in the CA.[29]

Apart from these textual arguments, the League presses the notion that the course of the ultimately failed negotiations for a stipulation in 2017 and 2018 demonstrates that both sides shared the League's understanding of the CA on this currently disputed point. The League notes that it had proposed a stipulation in January 2018 that stated, in pertinent part, that "[t]he undersigned parties will not assert that the production *or use* in this litigation of any [CDSI] that is subject

[28] There is no dispute between the parties that regardless of which side's interpretation might be adopted, the carriers could obtain some version of subject-matter waiver if they could demonstrate at-issue waiver. As we have observed, however, on the current record they have not met those requirements. (See pp. 16-22, supra).

[29] If the court were to find that the League was proffering evidence favorable to its position after withholding equivalent unfavorable evidence in discovery, it might order the unfavorable evidence produced, and that evidence -- obtained via normal discovery processes -- could be used for all purposes, but that outcome is plainly consistent with the terms of the CA, since it contemplates that the carriers can pursue litigative discovery and use its fruits without limitation. Although the CA states that the provision by the League of CDSI to the carriers is not a basis for ordering further disclosure by the League, the order for additional disclosure in the hypothesized scenario would be based on the League's intended use of CDSI in the litigation, not its earlier provision of that material in the non-litigative disclosure process.

to a Non Litigation Confidentiality Agreement constitutes a waiver of any of the NFL Policyholders' rights or privileges with respect to any such information or or any other information; . . ." (Lechliter Prot. Order Aff. Ex. 22B at para 3)(emphasis added). The League then points to a responding draft proposal by the carriers, submitted in April 2018, which stated, in wording that partly mimicked the League's prior draft: "[t]he undersigned *parties will not assert that the production or use* in this litigation of any [CDSI] that was previously provided under a Non Litigation Confidentiality Agreement *constitutes a waiver of any of the NFL Policyholders' rights or privileges with respect to any such information or any other information.*" (League Prot. Order Memo at 19; Lechliter Prot. Order Aff. Ex. 23B at para. 3 (emphasis supplied by League)). As the League notes, it was only in July 2018 that the carriers clearly rejected the notion that the League could "use" the CDSI in the litigation without running the risk of some form of waiver. (League Prot. Order Memo at 20 22).

The difficulty with this drafting history argument extends beyond the fact that the cited negotiations never led to an agreed upon document.[30] What the League does not italicize in the carriers' April 2018 draft is the following wording "that was previously provided". That phrase reflects a demand by the carriers now embodied in their current motion practice that the non waiver language of the CA (specifically paragraph 8 in Exhibit 1) should be deemed not to apply to any future provision of information under the CA. As the League notes, that demand proved unacceptable to the League, and in the wake of its rejection of that proposal, the carriers insisted that the non waiver provision applied as written, that is, as covering only "provision" of the CDSI and not its "use" by the League in litigation. (NFL Prot. Order Memo at 22; Lechliter Prot. Order Aff. para. 31).

[30] As the League's counsel confirmed, there is no drafting history for the CAs, which are the documents at issue on the current motion. (See Tr. 118).

This history underscores the point that taking one provision of a multi point document out of context as reflecting an admission by a negotiating party can be highly misleading. As one court observed in the context of a contract that was ultimately agreed to: "It is fair to assume that in any negotiation that encompasses as many disparate issues as do the guild agreements, the negotiators will agree to tradeoffs among the various negotiated items, with one side giving ground on some issues in exchange for concessions from the other side in other areas. The process of negotiation is thus likely to yield a complex pattern of results, most of which would have been different if the individual issue had been negotiated entirely separately from the others. Accordingly, plucking one term out of the contract is likely to yield a fairly arbitrary result." ASCAP v. Showtime/The Music Channel, Inc., 912 F.2d 563, 590 (2d Cir. 1990). In this case the stated willingness of the carriers to adopt a provision that gave full non waiver protection to the League's use of CDSI was linked to their demand for an immediate temporal cutoff for such protection, a package that the League declined. This sequence is not significant support for the League's current reading of the last sentence of paragraph 8 of the CA.

The carriers' reading of the CA is further reinforced by a point insistently made by them, as to the potential practical unfairness of the interpretation espoused by the League. There is no dispute that the CA allows the League to pick and choose what information to provide to the carriers in non litigative cooperation. While that is contractually permissible although the carriers reserve the right to argue that the disclosures actually undertaken by the League do not satisfy its cooperation obligation under the policies if any such disclosed material may be used by the League without an opportunity for the carriers to press for broader litigative disclosure premised on a sword and shield theory of waiver, the carriers would potentially be disarmed of their otherwise available right to argue for waiver based

on the unfairness of their adversary using a misleadingly edited body of evidence. This point is at least suggestive of the notion that, linguistics aside, it is implausible that the carriers intended such a result when agreeing to the CAs.

The League' response to this argument rests on its version of the disclosure process to date and the asserted impracticality of such deceptive conduct on its part. Thus it denies that it has engaged in such conduct and insists that such behavior cannot succeed because of a provision in the CA that gives the carrier the right to veto any proposed disclosure. Again, neither argument is fully persuasive.

The League asserts that it has not engaged in selective disclosure, but rather, for the most part, has simply provided information in response to specific requests by the carriers. (See League Prot. Order Reply Memo at 6 7; Lechliter Prot. Order Supp. Aff. at paras. 3 7 & Exs. A B; Tr. 99 103).[31] This may be true, though there is no meaningful current record of the specific requests by the carriers and details of the League's responses,[32] but in any event we are not called upon at this stage to decide the merits of an assertion that the League is actually engaged in a sword and shield strategy; indeed, that issue could not arise until the League seeks to use CDSI material in the litigation. The point made by the carriers is simply that the League could do so and that its interpretation of the CA would permit it to do so successfully.

---

[31] [redacted]

[32] [redacted] That is the extent of any evidentiary record on this point.

As for the alternative suggestion that such tactics are not possible because the CA gives the carrier veto power over any proposed disclosure, this assertion is not grounded in any specifics that would support the League's case. Depending on the nature of the carrier's request for information, it is not difficult to envision scenarios in which the League might have the ability to provide responses edited to seem more supportive of its goal of obtaining insurance coverage than full disclosure would allow. Moreover, depending on the specificity of the League's notice to the carrier as to what it proposes to provide, the carrier might well have no ready means to ensure that it is getting a comprehensive disclosure, particularly because the CA allows the League full freedom in choosing what it will provide to the carrier.[33]

In sum, although the question is a close one, we conclude that the carriers' interpretation of paragraph 8 is the more persuasive one.

There remains a need to clarify the consequences of our reading of the cited CA provisions on waiver, including particularly the scope of any potential waiver. [redacted] Second, the CA explicitly ensures that the League's provision of such materials to the carriers in the non litigative context, in order to serve their common interests, does not oblige the League

[33] To determine the extent of what is being withheld, the carriers might need to pursue documents in formal discovery and then assess what is included in a privilege log. Even then, no challenge could be invoked until and unless the League proposed to make affirmative use of specified portions of CDSI as part of its coverage case.

to provide other such materials to the carriers, either under the CA or in litigative discovery. That protection is also unaffected. [redacted]

The heart of our reading of paragraph 8 concerns the consequences flowing from the League's potential affirmative use of the CDSI in the coverage litigation. By itself, such affirmative use does not waive the protection of the privilege or work product immunity that would cover other materials. The one clarifying consequence, however, is that the carriers will be permitted as they would in ordinary litigation to attempt to demonstrate that the League's affirmative use of that material is afflicted with disabling unfairness in that it has withheld from the carriers equivalent information that is favorable to the carriers, and is thus using the privilege as both a sword and a shield. As for any remedy for such a proven course of conduct, that would be left to the trial court.[34]

2. Do the CAs Limit the Purposes for Which CDSI May be Used?

At one point in the carriers' briefing, they appear to assert that the provisions in the CAs that describe the

[34] We note that the League has not indicated that it has any intention to use in litigation the only category of CDSI thus far described -- [redacted]. It has also asserted that by virtue of the veto power afforded the carriers by the CAs, such one-sided disclosures are impossible or at least highly unlikely. If these propositions are valid, sword-and-shield challenges will be rare or non-existent, or else doomed to failure.

permissible uses of CDSI in coverage litigation notably in paragraph 3 of Exhibit 1 do not purport to limit the carriers' ability to use that material for any purpose as long as relevant to the case. (Carriers Prot. Order Memo at 23 24). This argument is risible.[35]

Each of the three paragraphs that deal with the three categories of protected information first specify what use the carriers may make of such documentation for purposes of assessing coverage issues and deciding whether coverage is warranted. Those sentences are explicitly restrictive, stating for example, in paragraph 3 that CDSI "may be used by the Insurer Parties solely for the purpose of evaluating and providing comments and/or consent to Policyholders in connection with the defense and/or resolution of Underlying Claims . . . ." The next sentence in each paragraph then refers to permitted uses of that same material in possible coverage litigation and specifies what use may be made. Thus, again quoting paragraph 3, the text reads: "Notwithstanding the above, [CDSI] may be used in a . . . litigation of a dispute between Policyholders and Insurers relating to the reasonableness of the defense or settlement of the Underlying Claims." Treated as a plainly restrictive provision, that sentence precludes use of the CDSI to litigate the question of whether the policy covers the loss.

As we understand the carriers' argument, it appears to rest on the notion that because this second sentence does not use the word "solely", the statement of the permissible uses is only illustrative, and does not limit the uses to which the carriers may put CDSI. This assertion is mystifying. Given the fact that the second quoted sentence follows the statement of uses permitted to

[35] In fairness, I note that during oral argument counsel for the carriers appeared grudgingly to backtrack from this assertion, suggesting that his clients would be freed from use limitations only if they could obtain the CDSI in discovery. (See Tr. 135-39).

the carriers in evaluating the League's demand for coverage (including the word "solely"), it is obvious that the intent was to define the universe of permitted uses in the context of coverage litigation. Indeed, were that not the case, there would be no need for the quoted sentence regarding litigation uses. Further, if the intent were to provide merely an example of a use from an otherwise undefined universe of permissible uses itself a strange notion the drafters would presumably have stated, in substance, that the CDSI may be used for any relevant purpose or, if it cited one among many such purposes, it would attach the words "without limitation" to the text.

In sum, the carriers' argument in this respect is manifestly meritless.

3. Is There a Temporal Cutoff to the CAs?

As noted, the carriers pursue the notion, raised in negotiations for a stipulation, that future non litigative disclosures by the League should not be governed by the CAs. The short answer to this contention is that the CAs contain no such cutoff, and are plainly designed to continue in force as long as there is a need for cooperative disclosures by the League. Since a number of player cases remain pending, the League will need, at the very least, to provide a continuing flow of invoices and other cost information to the carriers, and depending on the circumstances possibly information on settlement negotiations or other pertinent litigation events.

D. The Westport Issue

As noted, Westport, as a late addition to the coverage suits, never signed a CA, but it nonetheless has sought access to the CI, CDII and CDSI that have been disclosed to other carriers under their respective agreements. Given that circumstance, the League seeks an order either involuntarily applying to Westport the same provisions as are embodied in the CAs agreed to by the other carriers, or authorizing the League to withhold that information

from Westport until and unless it enters into a CA with the League.

The trigger for the League to turn over privileged or confidential materials to the other carriers was their agreement to the terms of the CAs. Moreover, even under the CAs, the disclosure by the League of such information was entirely voluntary, with the only incentive being the need to comply with the cooperation provisions of the various policies. Absent such an agreement, there is of course no legal basis to require the League to make the same materials available to Westport outside the litigation.

Insofar as Westport apparently seeks these items via discovery rather than in the non litigative context of the CAs, the League is invoking privilege or work product immunity, as applicable, to block access, absent conditions embodied in a protective order that are equivalent to the terms of the CAs.[36] We are presented with no meaningful rationale for requiring production to Westport of material protected by the attorney client privilege or work product immunity absent such conditions.[37]

In substance, Westport seems to argue solely that the materials in question should not be deemed protected for reasons that echo the carriers' motion to compel production of the League's defense and settlement documents. (Westport Prot. Order Memo at 10 15). Having

---

[36] The League has made clear that it is prepared to produce to Westport in discovery the CI, CDII and CDSI made available to the other carriers, conditioned on the imposition of the same conditions as are found in the CAs. (NFL Prot. Order Memo at 35).

[37] We have noted that work-product immunity is usually deemed to provide only conditional protection, and may be overcome by a showing of sufficiently compelling need. (See p. 24, supra (citing inter alia CPLR sec. 3101[d][2]). Westport, however, has not made any such showing.

denied that motion, we reject the same arguments now embodied in Westport's opposition to the League's motion for a protective order. Accordingly, since Westport wishes access to the materials in question, we are prepared to enter a protective order directing production on the terms found in the CAs.[38]

E. Conclusion

For the reasons stated, the League's motion for a protective order is granted in part, to the extent stated, and otherwise denied.[39] The League may submit a proposed order consistent with the foregoing terms.

IV. The Carriers' Omnibus Motion

The carriers have moved for an order compelling production by the League of an assortment of categories of documents. In large measure, this application seeks broader discovery on topics for which some documents have been produced, although in a few instances the League objected, at least in the first instance, to any production of the subject matter.

The carriers seek (1) an e document search based on 46 new search terms and targeting 25 new custodians, (2) production of additional documents reflecting the League's claimed damages most specifically, claimant specific documentation of claims filed by former players under the MDL settlement and payments made to date, (3) indemnification agreements between the League and others,

[38] With respect to CI, since it is not protected by the privilege or work-product immunity but is subject to the governing CO, there is no basis to withhold its production from Westport in any event.

[39] As noted, the carriers did not address the CI and CDII categories, and we therefore deem the League's motion with respect to those categories to be unopposed.

notably including helmet manufacturers and the NFL teams, (4) insurance policies covering the entity known as NFL Europe, and (5) documents reflecting communications between the League and the former players who opted out of the MDL settlement, as well as any evaluations by the League of the opt out cases. The League has opposed most of these requests. We address each of these categories in turn.

A. The Electronic Search: Search Terms and Custodians

The carriers dismiss the significance of these figures, asserting that a large percentage of this wave of paper consists of publicly available documents of little or no utility in this case. In any event, as part of their effort to acquire more relevant documents, they asked the League to conduct an e search using 46 new search terms and targeting 28 new custodians. Following a stalemate on these demands, the carriers now seek relief from the court.

[40] The requests targeted by this search included nos. 26, 31, 33-34, 42-70, 72-84 and 86-88 of the Carrier's Second Omnibus Demand. (Watson Omnibus Aff. at para. 23 n.2 & Ex. 18).

1. The Search Terms

The carriers press the need for an expansion of the search terms to target perceived relevant areas of inquiry that were either not accounted for by the original list or possibly not sufficiently searched. [redacted] (Carriers Omnibus Memo at 17 22; Carriers Omnibus Reply Memo at 6 17).

In opposing the application for a new search based on the addition of the list of 46 proposed search terms, the League relies in part on the fact of the prior search, the volume of pages produced as a result, the contention that some of the new terms are likely to produce the same documents because they overlap with the prior search terms, and the time and expense of undertaking such a new search. (League Omnibus Memo at 8 13; Watson Omnibus Aff. at para. 40 41). It also seeks to distinguish the caselaw cited by the carriers for the proposition that a court may order a party to use search terms proposed by its adversary. (League Omnibus Memo at 12 13).

We start with a statement of the obvious. If a litigant can demonstrate that its adversary is proposing to use, or has used, search terms that do not provide reasonable assurance that they would yield an adequate production of relevant documents, the court may direct that the searcher undertake a broader or further search using search terms proposed by the complaining party if those terms seem likely to yield additional relevant information. See, e.g., Ling v. Kemper Independence Co., 2015 N.Y. Misc. LEXIS 2172, *7 11 (Sup. Ct. N.Y. Cty. June 18, 2015); U.S. Bank, N.A. v. Merrill Lynch Mortgage Lending, Inc., 2014 N.Y. Misc. LEXIS 4983, *10 14 (Sup. Ct. N.Y. Cty. Nov. 13, 2014); Capitol Records, Inc. v. MP3tunes, LLC, 261 F.R.D. 44, 50 (S.D.N.Y. 2009); see also MASTR Adjustable Rate Mortgages Trust 2006 OA2 v. UBS Real Estate Secs., Inc., 2013 WL 5651290, *2 (S.D.N.Y. Oct. 15,

2013)(making clear that court may order use of search terms absent parties' agreement).

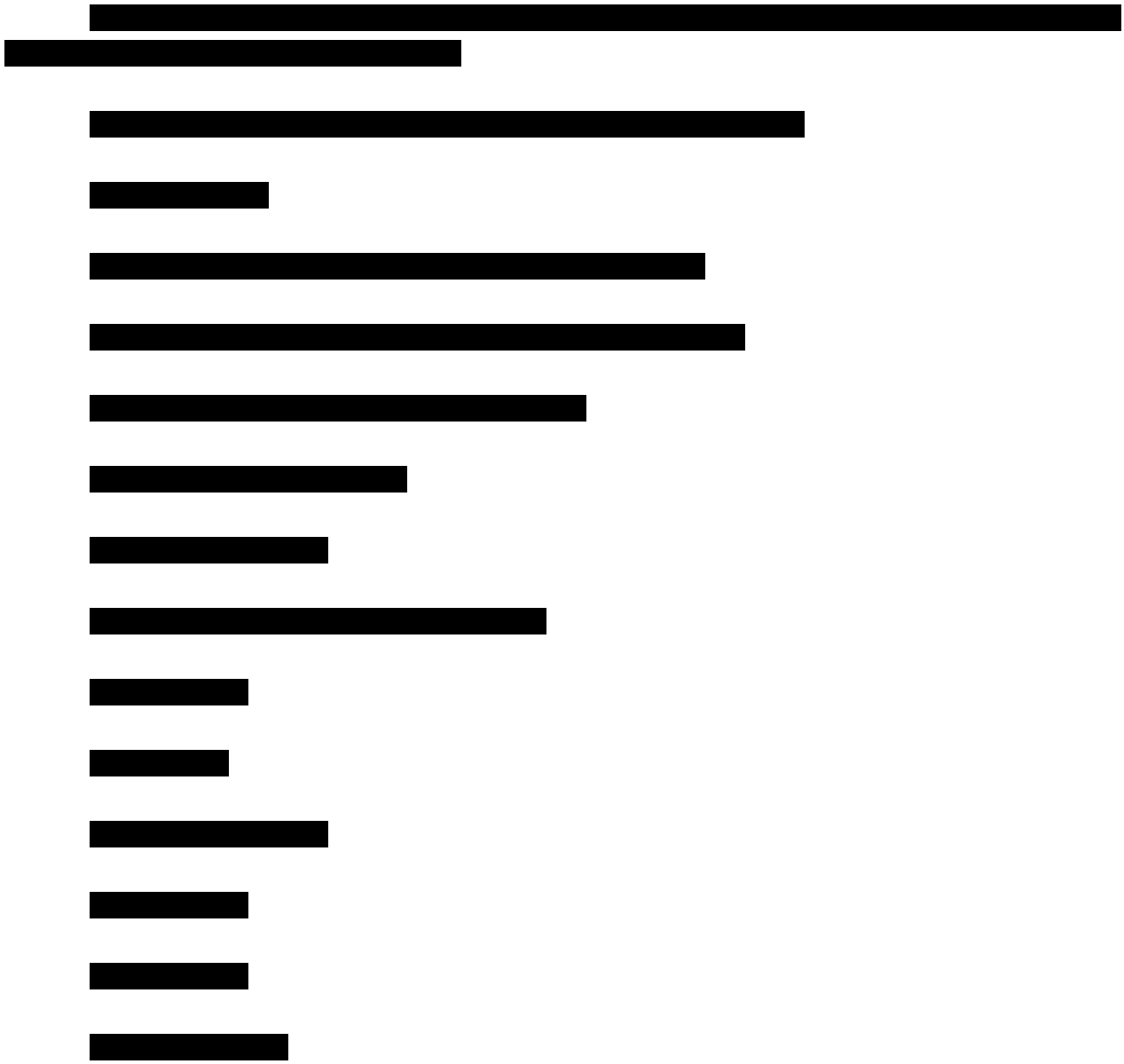
The carriers provide a list of proposed additional search terms with brief explanations of their relevance (Almond Aff. para. 22 & Ex. P), accompanied by general representations as to their need for a fuller production of documents, the asserted irrelevance or relative insignificance of much of the League's [redacted] production, and fuller explanations of some of the proposed search terms. (E.g., Carriers' Omnibus Memo at 5 8; Carriers Omnibus Reply Memo at 10 17). They also make the point that the League's list of terms was approved for an early mediation session, a context in which such an exercise was likely to be less comprehensive than what is needed in the litigation. (Carriers Omnibus Reply Memo at 13).

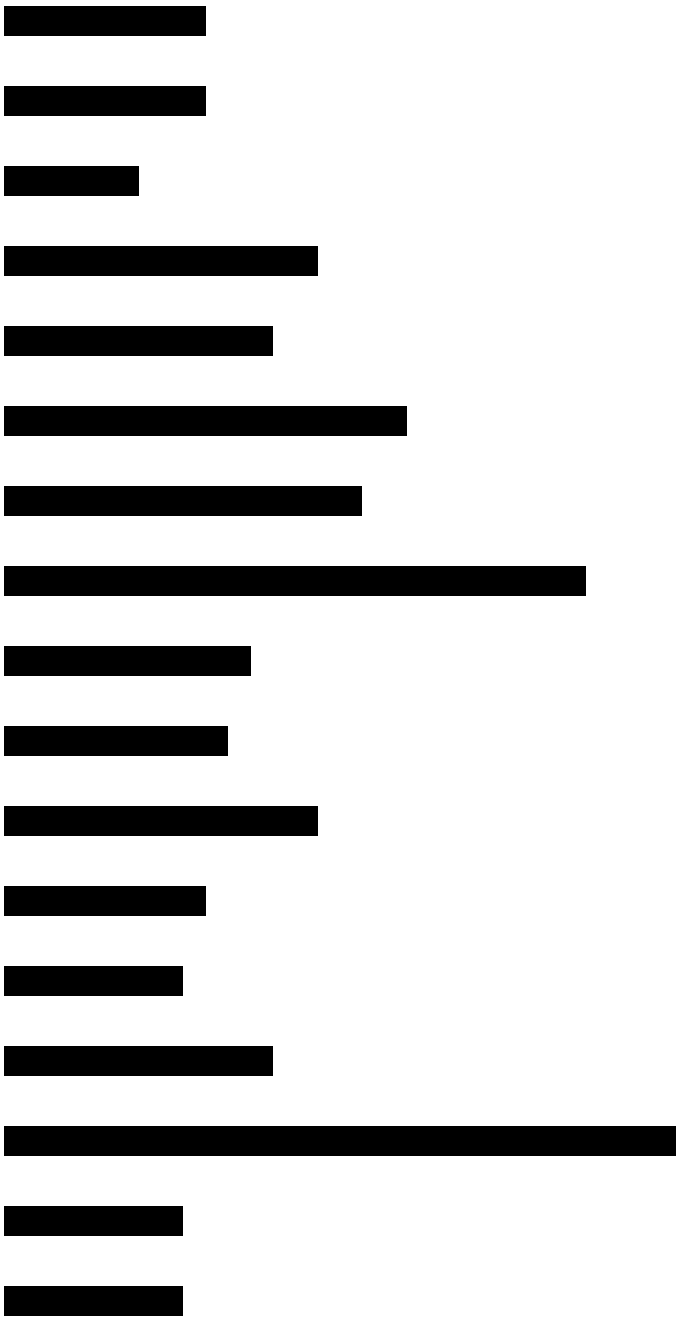
We have reviewed the carriers' list, as well as the list of search terms used by the League (Watson Omnibus Aff. at para. 19 & Ex. 18 (second attach.)) and conclude that most of the terms proposed by the carriers are merited. In doing so, we note that to the extent that some of these terms overlap with those already utilized, the byproduct of duplicated documents may be eliminated by a so called de dupe program. As for the League's claim of undue burden,[41] it rests on a fairly conclusory set of assertions and is premised on the inclusion of all 46 requested terms. We further note that although the task to be required of the League might be deemed fairly challenging in most commercial cases, the extraordinary financial stakes at issue in this case have led both sides in turn to argue with some credibility that their respective adversaries should be expected to bear far more

[41] [redacted]

substantial burdens than would normally be the case. (See, e.g., NFL Response to Insurers' Submissions Regarding Burden at 20; Carriers' Omnibus Memo at 12. See also 22 NYCRR sec. 202.70 App. A, para. III at A & B (proportionality factors)).

Based on a comparison of the two sets of search terms and the explanations offered by the carriers for their current requests, the following search terms are to be utilized:





2. Custodians

In the carriers' initial motion papers, they listed 28 individuals as requested additional custodians for the League's e search. (Almond Omnibus Aff. at para. 20 & Ex. N). They have subsequently dropped three of them as they

are not under the League's control.[42] The carriers argue that the relationship of the remaining 25 to the League and to relevant events and knowledge fully justify a search of their files, as that search is likely to expose relevant documents not otherwise located by the League's search of its chosen 15 custodians. (Carriers Omnibus Memo at 17 19; Carriers Omnibus Reply Memo at 19 21).[43] In support of that contention, the carriers note that a search for the names of these proposed custodians in the documents provided by the League provoked [redacted]. (Carriers Omnibus Reply Memo at 19, 21; Almond Omnibus Reply Aff. at para 20).

In opposition the League insists that its list of custodians "is well balanced and reasonably calculated to locate documents responsive to the Insurers' disclosure requests." (League Omnibus Memo at 13). As for the proposed new custodians, the League initially refers to what it categorizes as ten "Insurance Custodians", and represents that it has been searching for and producing "insurance documents" from all but one of these individuals, although it does not specify the meaning of the term "insurance documents" a category apparently narrower than what the carriers seek. (Id. at 14).

[redacted]

[42] The three are [redacted] (League Omnibus Memo a 15).

[43] The League's list of custodians is found in Almond Omnibus Aff. Ex. H.

[redacted]

We decline the carriers' request to add the various attorneys who represented the League in the MDL and related proceedings. That step would amount to nothing more than a prolonged tutorial in the attorney client privilege or work product immunity.

We conclude that the following individuals from the carriers' proposed list must be added as custodians for purposes of the e search:

[redacted]

[44] [redacted]

[45] [redacted]

B. Damages

The carriers next seek production of information about the League's damages, a request that encompasses detailed information as to claims filed under the MDL settlement agreement and payments made, as well as defense costs. (Carriers Omnibus Memo at 22 25; Carriers Omnibus Reply Memo at 21 24; Almond Omnibus Aff. at paras. 6 7 & Ex. B at request 12, Ex. C at interrogatories 16 & 17). They also ask by interrogatories for a breakdown of which carriers, according to the League, owe what amounts of each type of damages. (Id.).

In resisting the motion the League noted that it had been providing the carriers with, among other documentation, "detailed summaries of settlement registration data and all settlement claim resolution and claim payment details" prepared by the settlement claims administrator. (League Omnibus Memo at 19; Watson Omnibus Aff. at paras. 43 46 & Exs. 31 33). In addition to providing these spreadsheets, the League represented that it was willing to discuss providing "a fair random sample of underlying . . . materials" reflecting data aggregated in the spreadsheets. (League Omnibus Memo at 19). Finally, it noted that it was providing its cost documentation, in the form of invoices, under the CAs and would provide it in discovery as well if it prevailed on its protective order motion. (Id. at 19 20). It did object, however, to answering the interrogatories insofar as they required a breakdown of how the League's damages should be allocated

among the carriers, as these queries demanded what amounted to the League' legal contentions. (Id. at 20 22).

In the wake of oral argument, the League agreed to produce on a periodic basis the back up documentation for the spreadsheets that had been and are still being provided on a continuing basis covering claim resolution and claim payment details in a claimant specific format. (Dec. 14, 2018 letter from John E. Hall, Esq.). That commitment satisfies what we view as the League's obligation to provide specific settlement damages information at this stage of the litigation.[46]

It is not clear that the carriers are questioning whether the League is providing sufficient data about its costs, but there appears to be no dispute that it is turning over invoices under the applicable CAs. Absent any current dispute about their provision or the use to which the carriers may put them, we are not called upon to address this aspect of claimed damages.

As for the carriers' request, by interrogatories, for a breakdown of which entities are claimed by the League to be responsible for reimbursement of which sums, we agree with the League that this question amounts to a contention interrogatory rather than an inquiry about the calculation of damages. Accordingly, a required substantive response to it is premature under Rules 11 a(b) & (d) of the Commercial Division, 22 NYCRR sec. 202.70, Rule 11 a. See, e.g., New Haven Temple SDA Church v. Consolidated Edison

[46] There remains a potential disagreement between the League and the carriers regarding whether the carriers need to approach the MDL court to obtain approval for whatever use the carriers intend to make of this damages material, which apparently contains medical information, and -- in the view of the League -- is governed by a confidentiality order from the MDL court. (See id. at 1-2 & Ex. A at paras. 1(h), 4; Jan. 4, 2019 letter from Christopher R. Carroll, Esq.). That matter is not ripe for consideration here, if it ever will be.

Corp., 1995 WL 358788, *5 (S.D.N.Y. June 13, 1995).[47]

C. Indemnity Agreements

The carriers next press their demands, found in document requests 31, 32 and 36, for indemnity agreements to which the NFL may be a party with [redacted] the NFL teams, as well as communications about those agreements. (Carriers Omnibus Memo at 25 28). [redacted] As for the League's relationship with its constituent teams, its counsel represented that there is no indemnification agreement that would be pertinent to the current case, and that any obligations of the teams to indemnify the League under any scenario are reflected in the by laws of the League, which have been produced to the carriers, along with the League's constitution. (Tr. 215 20).

Although counsel for the carriers expressed some skepticism about the extent of the teams' indemnification obligations, there appears at present no litigable dispute about the adequacy of the League's document production in this matter. The carriers are of course free to pursue the question of the teams' obligations by way of deposition, and if that process yields a different picture from the League's current portrayal of the facts, they may revisit the question of document disclosure.

D. NFL Europe

NFL Europe was not a party to the MDL litigation, although the settlement provided a release of any claims against it. On that basis the carriers have sought

[47] The Commercial Division rules parallel the Civil Rules of the Southern District of New York.

production of certain documents concerning that entity, including liability insurance policies in its name and communications with the League. (Carriers Omnibus Memo at 29 30).

The NFL reports that it has provided all liability policies of which it is aware, many of which include NFL Europe as a covered party. (NFL Omnibus Memo at 24; Tr. 249 51). As for communications with NFL Europe, the League notes that that entity was not a party in the MDL suits or in this litigation, and has made no payments for which the League seeks reimbursement, and that its inclusion among the entities released by the MDL settlement reflects the normal practice of businesses with multiple affiliated entities. Accordingly, it urges, there is no occasion to search for and produce the requested communications. (Tr. 252 53).

We concur with the League's position on this point and accordingly deny this aspect of the carriers' motion.

E. The Opt Out Claimants

In document requests 38 and 39, the carriers asked for production of communications with the opt out players and the League's evaluation of the pending opt out lawsuits. (Carriers Omnibus Memo at 30 31). The League represents that it is producing all substantive communications with the opt out players and their counsel, that is, "discovery requests, all pleadings, all fact sheets, all deposition transcripts[,] anything that comes out of the underlying litigation." (Tr. 223 24; see League Omnibus Memo at 25; Watson Omnibus Aff. Ex. 17 at response 90). That is sufficient compliance with the carriers' demand for communications.

As for the requested evaluations of the opt out cases, that effort runs squarely into claims of attorney client privilege and work product immunity (League Omnibus Memo at 25), and indeed counsel for the carriers conceded as much. (Tr. 223; Carriers Omnibus Memo at 30 31). Until the

carriers are prepared to challenge such claims which they have not attempted to do at this stage there is no occasion to address this category of documents.[48]

IV. The Carriers' Motion for Historic Documents

The carriers have moved separately to compel production by the League of what they refer to as "historic documents". This term refers to documents from earlier decades especially predating 2000 which the carriers contend are likely to demonstrate that the League was long ago aware of the risks of serious neurocognitive injuries from head trauma typical of professional football and that the League sought to hide this information from the players and the public.

The trigger for the current motion, according to the carriers, is the suspect absence of such documents from the League's [redacted] production. Indeed, of the approximately [redacted] documents turned over, they say, only three percent predate 2001 and almost none correspond to categories of crucial significance for the case. In their initial motion papers, they further contend that the League has refused to produce documents pertinent to [redacted]. They also cite what they claim is the complete absence of documents responsive to a number of their key document requests. (Carriers Historic Memo at 1 2, 12 19; Carriers Historic Reply Memo at 5 12).

The League has opposed the motion on a variety of grounds. It first contends that the carriers have failed to comply with the requirement of the Commercial Division rules that, before filing a discovery motion, counsel must "confer[] with counsel for the opposing party in a good

[48] As we have noted, the League had not provided a privilege log as of the time of oral argument, nor have we been advised that one has since been forthcoming. We address the timing of such a step at the conclusion of this decision.

faith effort to resolve the issues raised by the motion". 22 NYCRR sec. 202.7(a)(2). (See League Historic Memo at 4 5; Watson Historic Aff., para. 32 & Ex. 24 at 5). The League further asserts that it carried out comprehensive electronic and hand searches and imposed no pre 2000 cutoff, and that it in fact produced whatever older documents it could find. (League Historic Memo at 7 9; Watson Historic Aff. paras. 5 22 & Exs. 2, 4 15; Tr. 277 84). It explains the relatively small percentage of documents dating from pre 2000 as attributable in part to the predominance in that earlier era of hard copy documents and the subsequent rapid increase in the use of e mails and other electronic means of communication and storage, as well as to the increasing focus post 2000 on problems of head trauma in contact sports. (League Historic Memo at 10 11). Finally, the League points out that it has not refused to produce documents because of concern about their impact on the opt out cases; rather, it notes that the carriers are referring to arguments that it had made pre discovery in 2016, when it sought to maintain a stay of this litigation for fear that its position in the player cases could be compromised. (Id. at 6 7).

In reply the carriers recite a number of subject matter areas concerning which they say few or no documents were produced.[49] They further assert that on earlier occasions the League had represented that documents relevant to the carriers' E&I defense existed, and yet it produced few or none. (Carriers Historic Memo at 12 14). They also critique what they claim inaccurately the League is asserting, that it need not produce all locatable documents provided that it produces some. (Id. at 15 17).

[49] These include documents about brain injuries and deaths of specified players, player disability claims, the MBTI and Neck & Injury Committees, documents referring to the MBTI Committee, and communications with the helmet manufacturers. (Carriers Historic Memo at 5-12).

In substance, the current dispute[50] revolves around the question of whether the League has made a proper search for documents, particularly in its manual search. The record does not reflect a sufficient evidentiary basis at this time for any relief to the carriers beyond our ruling on the carriers' omnibus motion regarding e searches. (See pp. 47 54, supra). If the party producing documents insists that it has undertaken an appropriate search and if that search has led to the disclosure of what the discovering party views as a suspiciously disappointing trove of documents, the court is ordinarily not in a position based solely on those facts to order a repeat search or production of more documents. Even if there are some at least arguable reasons to be skeptical as to the completeness of the search,[51] we lack a sufficiently firm basis on the present record to require a further search at this point, with the carriers ultimately asserting in effect that they suspect (albeit without concrete evidence) that the League's manual search was inadequate.[52]

---

[50] Contrary to the insistence of the League that there is no dispute between the parties, there plainly is a controversy about the completeness of the League's production. That is not to say that the asserted failure by the carriers to confer is excusable. As we noted at oral argument, whatever discussion occurred was grossly inadequate. (Tr. 305; see, e.g., id. at 301-03).

[51] The carriers in their reply note that the MDL plaintiffs had alleged that the League knew of the danger of concussive injuries as far back as the 1950s, and they infer that there should be documents to that effect in the League's files. (Carriers Historic Reply Memo at 3). They also assert that the League had represented at certain times that various categories of documents existed and yet those categories are either not represented or under-represented in the lode of documents produced to date. (Id. at 2). In addition, they argue that the League has carefully avoided saying that it has produced "all" responsive documents. (Id.). All of these assertions are disputed by the League.

[52] The carriers' reliance on such suspicions may be attributable, at least in significant part, to their failure to

Of course, the carriers are not without remedies. We note that the question of the adequacy of the League's electronic search has been raised and addressed in the context of the carriers' omnibus motion. That relief may yield additional documents. Furthermore, the carriers are free to pursue the details of the League's retention and storage of documents and the precise steps undertaken to conduct searches including hand searches for older documents by way of detailed discussions with the League and, if needed, well targeted depositions. Further, if the carriers can demonstrate a firmer basis for concluding that the League has failed to make a sufficiently comprehensive search, the court may issue specific directives to the League to undertake a search in compliance with specific criteria that it has heretofore neglected. Moreover, if there is a basis for inferring that documents have been hidden or destroyed, the League may be subjected to sanctions limiting its ability to assert certain defenses or to contest certain factual assertions of the carriers. At present, however, the record is inadequate to justify any of these remedial steps.

In sum, we conclude that there is no basis for relief on the current motion, which we deny.

V. The League's Omnibus Motion

The final motion that we are called upon to consider originates with the League, which seeks relief in the form of an order compelling the carriers to search for and produce (1) documents reflecting their historical knowledge of the dangers of brain injuries resulting from football and other contact sports, (2) documents pertaining to the carriers' claims handling of the League's demands for coverage, (3) materials concerning

---

conduct meaningful discussions with League representatives about the details of the League's document retention practices and its searches for documents.

reserves and reinsurance, and (4) underwriting and claims manuals. The carriers oppose the motion in its entirety, while insisting that they have produced all non privileged documents that constitute purely claims handling materials.

We address these disputes seriatim.

A. The Carriers' Knowledge of Risk Factors

The first set of controversies is triggered by requests 22, 24, 25 and 32 of the League's Third Request for Production (Cho Omnibus2 Aff. Ex. 1).[53] These call for "all" documents (1) referring to the sharing of information among the carriers "[c]oncerning claims relating to concussions or sub concussive impacts arising from participation in any [s]port" (no. 22), (2) "concerning any risk of head, brain, or neurocognitive injury arising from any participation in any [s]port" (no. 24), (3) "[c]oncerning any risk of insurance exposure arising out of or related to concussions or sub concussive impacts arising from participation in any [s]port" (no. 25), and (4) "concerning concussions, concussive or sub concussive impacts, head or brain injuries, neurocognitive impairment, dementia, Alzheimer's Disease, Amyotrophic Lateral Sclerosis . . . or Chronic Traumatic Encephalopathy, actually or allegedly arising out of or relating to football" (no. 32).

The carriers resist these demands, contending that their knowledge of the risks of contact sports leading to possible brain injuries or related maladies is irrelevant, and that requests for production of documents pertaining to the claims of other insureds are per se improper or at least frowned upon for a variety of reasons. (Carriers Omnibus2 Memo at 4 16). They further assert that to locate the types of documents that are requested would require

[53] We cite the motion papers from the League's omnibus motion as "Omnibus2", to distinguish them from the papers generated by the carriers' omnibus motion.

them to search through an immense volume of claim and underwriting files and would be unduly burdensome, particularly in view of their, at best, marginal relevance. (Carriers Omnibus2 Memo at 12 14; Dec. 14, 2018 letters from Christopher R. Carroll, Esq. & William E. McGrath, Esq.; Affs. Of Santiago Medeiros, Amy E. Fitzpatrick, Jonathan Domante, Kurt Schaden, James Biondolillo, Nina Lynn Caroselli, Daniel P. Kulakofsky, Martin Szeber, Julye Frankland, Jack W. Horton III, and Thomas V. O'Kane; Jan. 11, 2019 letter from Daren S. McNally, Esq.).

It appears that the requests in issue principally target documents arguably residing in the claims files pertaining to other insureds, though they also sweep broadly enough to cover documents or files maintained by any of the carriers that are separate from such claims files. In defending these requests, the League articulates the suspicion that the carriers, having been faced with a plethora of cases in which various sports organizations have been sued for such injuries, undertook some consideration of the risks entailed in contact sports, or at least became aware of those risks. The premise for these requests is the contention by the League that knowledge by the carriers of such risks would be pertinent to a variety of the dozens of defenses that the insurers have asserted in this litigation, including E&I, known loss, and misrepresentation or omission. (League Omnibus2 Memo at 10 20; League Omnibus Reply Memo at 1 6). The League has also contested the adequacy of the carriers' showing on burden. (League Response to Insurers' Submission Regarding Burden passim.).

Putting to one side the question of overbreadth in the quoted requests by the League, the possible knowledge of risks by some or all of the carriers appears in principle to be relevant to at least several of the defenses that they have pled. Thus, among these defenses we find assertions of misrepresentation or omission (see Cho Omnibus2 Aff. Ex. 4 at 15). Since reasonable reliance is an element of a claim or defense of misrepresentation,

see, e.g., Brown v. State Farm Ins. Co., 237 A.D.2d 476, 476 77, 55 N.Y.S.2d 104, 105 (2d Dep't 1997)(dismissing misrepresentation defense)(citing Callas v. Eisenberg, 192 A.D.2d 349, 350, 595 N.Y.S.2d 775, 776 (2d Dep't 1993)(noting reasonable reliance is a required element of fraud claim)), proof of the carriers' knowledge of the risk of brain trauma would undercut the cited defense. See N.Y. Insur. Law sec. 3105(b)(1). A known loss defense is also invoked by some of the carriers (see Cho Omnibus2 Aff. Ex. 6 at 23), and New York caselaw has recognized that this defense may trigger an inquiry into the carriers' prior knowledge. See Chase Manhattan Bank v. New Hampshire Ins. Co., 193 Misc.2d 580, 589, 749 N.Y.S.2d 632, 639 (Sup. Ct. N.Y. Cty. 2002)(quoting Couch on Insurance 2d, at sec. 102.8). The parties spend further time and space debating whether the E&I defense also potentially invites an examination of the carriers' knowledge. This issue is more clouded, but there is New York authority for the proposition that, at least for discovery purposes, the insured may undertake limited inquiry in the face of such a defense. See Brooklyn Union Gas Co. v. Century Indemnity Co., 2005 WL 6226509, at 6th 7th pgs. (Sup. Ct. N.Y. Cty. March 7, 2005).

Notwithstanding our conclusion that the carriers' knowledge of risk is potentially relevant, there remains the further question of whether that would justify the search of claim files that the League seeks. We conclude that, on the current record, it does not.

We start by noting the strong disinclination of New York and other courts to mandate such a search for a variety of reasons, even when there are litigable issues about the interpretation of policy terms. These include potential issues of confidentiality or privilege, marginal relevance, concerns with the potential for satellite litigation, and especially burdensomeness. See, e.g., Gold Fields American Corp. v. Aetna Cas. & Sur. Co., 1994 N.Y. Misc. LEXIS 709, *3 13 (Sup. Ct. March 3, 1994); Greenman Pedersen, Inc. v. Zurich American Ins. Co., 54 A.D.3d 386, 387, 864 N.Y.S.2d 39 (2d Dep't 2008); Radicia v. Aetn Cas.

& Sur. Co., 145 A.D.2d 994, 995, 536 N.Y.S.2d 359 (4th Dep't 1988); Belco Petroleum Corp. v. AIG Oil Rig, Inc., 179 A.D.2d 516, 579 N.Y.S.2d 24, 26 (1st Dep't 1992). Significantly, even the cases that the League cites did not order production of other claim files. Thus, in Brooklyn Union Gas the court merely upheld the insured's request to include, as one among other topics in a planned deposition, the question of the carrier's knowledge of risks associated with manufacturing gas plant sites. See 2005 WL 6226509 at 6th 7th pages. And in Champion Int'l Corp. v. Liberty Mut. Ins. Co., 128 F.R.D. 608, 610 (S.D.N.Y. 1989), aff'g 1989 WL 299156, *1 2 (S.D.N.Y. Oct. 31, 1989), the court, while recognizing the potential relevance of other claims information, limited the insured to a one day deposition to explore the degree of burden, criteria for judging purported similarity of claims, and possible alternatives to a wholesale file search. Id. at *2.

In this case we start with the breadth of the League's demands, covering without temporal limitation all documents that pertain to concussions, brain injuries and a variety of other conditions and illnesses arising from any sports. The submitted burden affidavits of the carriers offer a colorable case for the notion that to meet these demands would require a gargantuan project of sifting through files. In the main, the affidavits suggest that the companies lack a comprehensive searchable database to locate files pertaining to the topics listed by the League. They go on to say that the volume of files that would have to be searched run depending on the company from the tens of thousands into the millions. According to the carriers, apart from attempting to locate files that would match these categories, the searchers would have to review the files separately for possible sealing orders, medical information the disclosure of which is prohibited by law, other materials that would comprise confidential or privileged information, possible assurances from the carriers that bind them to seek consent from the insured for disclosure, and a multitude of other potential issues that would further complicate

the task of producing files for the League. See Medeiros Aff. at paras. 9 18, Fitzpatrick Aff. at paras. 8 12, Domante Aff. at paras. 6 15, Schaden Aff. at paras. 5 12, Biondolillo Aff. at paras. 7 24, Caroselli Aff. at paras. 5 17, Kulakofsky Aff. at paras. 9 21, Szeber Aff. at paras. 9 22, Frankland Aff. at paras. 8 19, Horton Aff. at paras. 7 25, O'Kane Aff. at paras. 9 15.

In response, the League parses these affidavits and engages in some inferences and even speculation to suggest that at least some of the carriers should be able to use more efficient means to locate at least some responsive documents. Most notably, it suggests that the carriers, or at least some of them, could likely achieve a partial responsive production by identifying sports related policyholders who are likely to have been targeted with personal injury claims, segregating the files of those policyholders, and then searching the relevant carrier's files for such claims. (League Burden Memo at 3 7).

The analysis proffered by the League leaves open the possibility that some relevant claims documentation might be more readily accessible than suggested by some of the carriers, but it scarcely provides a sufficient basis for ordering such searches. It simply rests on too many assumptions that are not as yet borne out by the record. Under the circumstances the League will be permitted to undertake targeted short depositions of the carriers to address whether there are efficient means of accessing materials that would satisfy some portion of the demands that are the focus of the pending motion. See, e.g., Champion, 128 F.R.D. at 610.

Apart from the carriers' claims and underwriting files, the League seeks an order compelling production of responsive documents that are not a part of those files. The carriers have not demonstrated an undue burden from searching for and producing such documents. This aspect of the motion is therefore granted.

Finally, we note that nothing precludes the League

from conducting depositions of the carriers that address the historical knowledge of the carriers concerning the risks of brain and related neurological injury arising from collisions in contact sports. See, e.g., Brooklyn Union Gas, 2005 WL 6226509 at 6th 7th pages.

B. The Carriers' Handling of the NFL Claims

The second category of disputed documents refers to the League's requests 20, 21 and 30 from its third set of demands. (Cho League Omnibus Aff. Ex. 1 at 7 & 8). They seek production of "all documents" that constitute "communications" among the carriers about "any NFL insurance policy" (request 20) or "communications . . . concerning any claims for insurance coverage for Underlying Injury Lawsuits by the NFL or NFL Properties" (request 21) and "all documents [c]oncerning the Underlying Injury Lawsuits." In substance, these requests are described by the League as targeting all claims handling documents created by or on behalf of the carriers. (See League Omnibus2 Memo at 20 24; League Omnibus2 Reply Memo at 11 15). In this motion the League focuses on three categories documents reflecting the carriers' assessment of the proposed class settlement, the carriers' consideration of the League's requests for defense costs and indemnification, and communications among the carriers about the League's claims for coverage. (League Omnibus Memo at 21 24).

The League seems to assert that while the carriers have produced some documents concerning claims handling, they have improperly withheld documents in the three listed categories. (Id. at 20 21). The carriers assert in response that they have produced all responsive documents except for those covered by the attorney client privilege, work product immunity or the common interest, or joint defense, rule. (Carriers Omnibus2 Memo at 16 20).

At oral argument, the League somewhat refocused its argument. Counsel noted that caselaw has held that claims handling is routinely subject to discovery, and that the

cutoff for purposes of assessing when the "anticipation of litigation" justifies invocation of work product is determined by when the carrier decides to reject the insured's claim. Accordingly, counsel demanded that the carriers confirm when they decided to reject the League's claims, and he argued that any documents created before then are discoverable. (E.g., Tr. 347 50). The carriers responded, in substance, that they had not made a decision to reject the claims some having reimbursed a portion of defense costs and reserved on coverage claims and they rejected the predicate for the League's demand, arguing that communications with coverage counsel even before a coverage decision are privileged. (E.g., Tr. 351 58).

We start by noting the governing standards in New York. Claims handling is considered to be "an ordinary business activity for an insurance company". National Union Fire Ins. Co. v. TransCanada Energy U.S.A., Inc., 119 A.D.3d 492, 493, 990 N.Y.S.2d 510, 511 12 (1st Dep't 2014). Thus "[d]ocuments prepared in the ordinary course of an insurer's investigation of whether to pay or deny a claim are not privileged, and do not become so 'merely because [the] investigation was conducted by an attorney.'" Id. (quoting Brooklyn Union Gas, 23 A.D.3d at 191, 803 N.Y.S.2d at 534). Accord, e.g., Venture v. Preferred Mutual Ins. Co., 153 A.D.3d 1155, 1159, 61 N.Y.S.2d 210, 214 (1st Dep't 2017); Edibali v. Bankers Standard Ins. Co., 2017 WL 3037408, *4 (E.D.N.Y. July 17, 2017)(quoting cases). Thus factual investigations and decision making on whether to uphold a claim, insofar as such decisions are based on the facts turned up by the investigation, are not protected. See, e.g., Melworm v. Encompass Indemnity Co., 37 Misc.3d 389, 391, 951 N.Y.S.2d 829, 831 32 (Sup. Ct. N.Y. Cty. 2012), aff'd, 112 A.D.3d 794, 977 N.Y.S.2d 321 (1st Dep't 2013)("[T]he payment or rejection of claims is a part of the regular business of an insurance company. Consequently, reports which aid it in the process of deciding which of the two indicated actions to pursue are made in the regular course of its business. Reports prepared by insurance investigators,

adjustors, or attorneys before the decision is made to pay or reject a claim are thus not privileged and are discoverable.").

That said, the attorney client privilege is not inoperative during the claims handling process. "Just because counsel is engaged as coverage counsel, it does not mean that counsel may not provide legal advice to his or her client, which would be subject to attorney client privilege." Edibali, 2017 WL 3037408, *4 5 (quoting Fox Paine & Co., LLC v. Houston Cas. Co., 51 Misc.3d 1212(A), 37 N.Y.S.3d 207 (Sup. Ct. N.Y. Cty. 2016)). See, e.g., 105 Street Assocs., LLC v. Greenwich Ins. Co., 2006 WL 3230292, *3 (S.D.N.Y. Nov. 7, 2006); Tudor Ins. Co. v. McKenna Assocs., 2003 WL 21488058, *3 (S.D.N.Y. June 25, 2003). To assess the applicability of the privilege to communications between the insurer and its attorney made prior to the rejection of a claim, the court needs to determine what role the attorney was playing when corresponding with the client; if the communication was "predominantly of a legal character", it will be protected. 570 Smith St. Orp. v. Seneca Ins. Co., 148 A.D.3d 561, 50 N.Y.S.3d 57, 57 (1st Dep't 2017). See, e.g., Brooklyn Union Gas, 23 A.D.3d at 191, 803 N.Y.S.2d at 533 ("document must be primarily or predominantly of a legal character"). Thus, the court is required to make a factual determination of the role of the attorney in connection with the assertedly protected documents. See, e.g., Venture, 153 A.D.3d at 1159, 61 N.Y.S.3d at 214 15 (counsel provided coverage letter regarding claim, based on facts assertedly developed by investigator; since parties disputed the scope of the lawyer's role in the investigation whether as attorney or investigator or in a hybrid role the court was unable to "determine [counsel's] true role" and remanded to allow deposition and findings by trial court); Edibali, 2017 WL 3037408, *5 ("much like any other context in which a party asserts the attorney client privilege, the Court must engage in a 'fact specific determination, most often requiring in camera review.'")(quoting Charter One Bank, F.S.B. v. Midtiwn Rochester, L.L.C., 191 Misc.2d 154, 157, 738

N.Y.S.2d 179, 184 (Sup. Ct. Monroe Cty. 2002)(quoting Spectrum Sys. Int'l Corp. v. Chemical Bank, 78 N.Y.2d 371, 378, 575 N.Y.S.2d 809, 814 (1991)).

In this case, the record is incomplete and thus precludes any detailed factual findings. The motion by the League is pitched at a level of generality that does not specify the documents in question that have been withheld, much less challenge a factual showing by the carriers of the basis for their invocation of privilege or work product immunity. We are left solely with the three broad categories of documents that the League is seeking, and an explanation of their relevance. This gap in the motion may be attributable to the apparent absence of a privilege log addressing these categories of documents, and we note also that the carriers' opposition does not attempt to make an evidentiary showing to support their assertion of privilege or work product, as is their burden. See, e.g., Spectrum Sys. Int'l, 78 N.Y.2d at 377, 575 N.Y.S.2d at 813 (proponent of privilege has burden of proof).

In sum, we face a record that is manifestly inadequate to make conclusive determinations (a) of which documents covered by the League's requests are being withheld, (b) if they embody communications with an attorney, whether they involve principally requests for, or the rendition of, legal advice or services, and (c) if they are documents internal to the carriers, whether the circumstances of their creation including its timing are consistent with their categorization as claims handling or were they created in anticipation of litigation. Moreover, if the internal documents constitute trial preparation material under CPLR sec. 3101[d] as distinguished from privileged matter or attorney's work product (see CPLR secs. 3101[b] & [c] it is uncertain whether the League can overcome the presumptive statutory protection by showing "a substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means." CPLR sec. 3101[d][2]. See

Venture, 153 A.D.3d at 1158 59, 61 N.Y.S.3d at 214.[54]

Finally, insofar as the oral argument on this phase of the League's motion devolved into a debate as to the timing of any carrier's decision to decline coverage a phraseology utilized by the League's counsel we note that a decision by a carrier to reserve rather than decline coverage might be treated as the temporal marker for when a claims handling process converts into anticipation of litigation. Moreover, by the time that litigation is actually instituted, that step clearly marks a departure from claims handling and thus serves in any event as a red line marker that further work within or among the carriers is likely subject to the protection of trial preparation materials.

Given the foregoing conclusions, we deny this aspect of the League's motion without prejudice to renewal upon an appropriate record.

C. Reserve Information & Reinsurance

Item 47 of the League's third demand for documents asks for production of reserve information, reinsurance policies and communications with the reinsurers. The League asserts that these documents are potentially relevant to the reasonableness of the MDL settlement and the League's claims of bad faith against certain of the carriers premised on their refusal to approve the settlement. (League Omnibus2 Memo at 24 30; League Omnibus2 Reply Memo at 15 18). The carriers oppose this request, contending that reserve information is either

[54] We note that the League does press the notion that materials reflecting the carriers' consideration of its claims for coverage and the reasonableness of the MDL settlement are significant for its trial preparation. (League Omnibus2 Memo at 21-23). The carriers respond by citing what they describe as a plethora of documents, including numerous letters to the League explaining their coverage analysis. (Carriers' League Omnibus2 Memo at 16-17).

irrelevant or marginally relevant, and suggesting albeit without specifics that reserve information, or some unspecified portion of it, may be protected by privilege or as work product. They further oppose required production of reinsurance policies and correspondence as irrelevant. (Carriers League Omnibus Memo at 20 28).

1. Reserve Information

State and federal courts have reached no consensus on the question of whether reserve information should be discoverable in any, some or all coverage lawsuits. In pressing for access, the League cites several federal court decisions in the Southern District of New York[55], as well as some in other jurisdictions, that have upheld such discovery at least in some circumstances, and the carriers cite one trial level New York court decision for a contrary proposition, as well as an assortment of similar rulings in other courts.[56]

We start by noting that in Gold Fields the only asserted relevance of the sought after reserve information related to the interpretation of contested provisions of the policy. (Id. at *14 15). In this case the League has not yet identified any policy provisions that it deems ambiguous, but that may result from the carriers' plethora of affirmative defenses and its open ended assertion that unspecified policy provisions may bar liability. (See Cho Omnibus2 Aff. Ex. 6 at 18 (Second Affirmative Defense)). In any event, the League points to its claims of bad faith against certain of the carriers[57] as well as the centrality of such question as whether the MDL settlement was

[55] See Champion Int'l, 128 F.R.D. at 612, aff'g 1989 WL 299156 at *2; Ins. Co. Of North Am. v. UNR Indus., Inc., 1994 WL 683423, *1 (S.D.N.Y. Dec. 4, 1994).

[56] See Gold Fields Am. Corp., 1994 N.Y. LEXIS 709 at *14-16.

[57] These include TIG, Travelers, OneBeacon, Continental and some of the Chubb entities. (See League Omnibus2 Memo at 5).

reasonable. (League Omnibus2 Memo at 25 27; League Omnibus2 Reply Memo at 15 16).

On these issues, we conclude that reserve information is potentially relevant, particularly given the broad scope of relevance for purposes of discovery under the CPLR. See, e.g., Allen v. Crowell Collier Pub. Co., 21 N.Y.2d 403, 406 07, 288 N.Y.S.2d 449, 452 53 (1968); Yoshida v. Hsueh Chih Chin, 111 A.D.3d 704, 705 06, 974 N.Y.S.2d 580, 582 (2d Dep't 2013). Thus it is not surprising to see a pattern of judicial approval for disclosure of reserves when designed to address these types of issues. See, e.g., National Union Fire Ins. Co. Of Pittsburgh v. H & R Block, Inc., 2014 WL 4377845, *3 5 (S.D.N.Y. Sep't 4, 2014)(citing & quoting cases); Fireman's Fund Ins. Co. v. Great Am. Ins. Co., 284 F.R.D. 132, 138 39 (S.D.N.Y. 2012); Groben v. Travelers Indemnity Co., 49 Misc.2d 14, 16 17, 266 N.Y.S.2d 616, 619 (Sup. Ct. Oneida Cty. 1965), aff'd, 28 A.D.2d 650, 282 N.Y.S.2d 214 (4th Dep't 1967). Accord, e.g., Imperial Textiles Supplies, Inc. v. Hartford Fire Ins. Co., 2011 WL 1743751, *3 5 (D.S.C. May 5, 2011)(citing & quoting cases); Andrew Robinson Int'l, Inc. v. Hartford Fire Ins. Co., 2009 WL 10692782, *4 5 (D. Mass. July 1, 2009)(quoting & citing inter alia Russ & Segalla, 17A Couch on Insurance sec. 251:29 (2005); Rhodes v. AIG Domestic Claims, Inc., 2006 WL 307911, *12 (Mass. Super. Jan. 27, 2006)); U.S. Fire Ins. Co. v. Bunge North Am., Inc., 2007 WL 1531846, *8 11 (D. Kan. May 25, 2007). Cf. Dade Cty. Fed. Credit Union v. Cumis Ins. Society, 2011 WL 13100237, *3 (S.D. Fla. Aug. 1, 2011)(absence of bad faith claim in case dictates no disclosure); Mt. McKinley Ins. Co. v. Corning, Inc., 2010 WL 6334283, *13 14 (Sup. Ct. N.Y. Cty. Feb. 25, 2010)(same).

We agree with those courts' conclusions that reserve information is relevant, for discovery purposes, to League claims of bad faith and any other claims or defenses pertaining to the reasonableness of the MDL settlement. In so finding, we recognize that there are arguments depending on the underlying facts about the creation of

the reserves that suggest reasons to question the significance of that data. See, e.g., First Horizon Nat'l Corp. v. Houston Cas. Co., 2016 WL 5869580, *14 15 (W.D. Tenn. Oct. 5, 2016). Nonetheless, we view those critiques as more appropriately advanced on either an in limine motion or as argument as to the probative weight of evidence offered at trial.

The principal remaining question is whether either the attorney client privilege or work product immunity might bar production. As noted, the carriers make only passing allusion to the vague possibility of such a bar. Such speculative ruminations are insufficient to sustain the carriers' burden of proof on a claim of privilege. See, e.g., Spectrum Sys. Int'l, 78 N.Y.2d at 377, 575 N.Y.S.2d at 813.

Finally, the carriers urge that the umbrella and excess carriers should not be required to produce reserve information, since they are not subject to a claim of bad faith and are not being sued on a duty to defend or a duty of good faith. (Carriers Omnibus2 Memo at 39 40)(citing cases). We agree.

In sum, we grant the League's motion to the extent noted.

2. Reinsurance Policies and Correspondence

The League seeks production of both the carriers' reinsurance policies and their correspondence with their reinsurers. Apart from citing CPLR sec. 3101(f), the League argues that these materials are relevant to a variety of issues in the case, including bad faith, the carriers' "understanding of the risk [they] underwrote" and "the interpretation and application of insurance policy language." (League Omnibus2 Reply Memo at 17). The carriers resist, arguing that these materials are irrelevant to any issues in the case, and that they constitute work product and may also be protected by the attorney client privilege and "the common interest

doctrine". (Carriers League Omnibus Memo at 25 28).

The production of the reinsurance policies themselves is seemingly mandated by section 3101(f),[58] and in fact the First Department has so held. See Clarendon Nat'l Ins. Co. v. Atlantic Risk Mgt., Inc., 59 A.D.3d 284, 286, 873 N.Y.S.2d 69, 70 (1st Dep't 2009); Anderson v. House of Good Samaritan Hosp., 1 A.D.3d 970, 971, 767 N.Y.S.2d 330, 331 (4th Dep't 2003).[59] As for correspondence with the reinsurers, we must address relevance as well as potential

---

[58] This section states:

(f) Contents of insurance agreement. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purpose of this subdivision, an application for insurance shall not be treated as part of an insurance agreement.

[59] The carriers invoke Mt. McKinley, 2010 WL 6334283 at *12, for the contrary proposition. (Carriers Omnibus2 Memo at 26). Their reliance on this decision is problematic for various reasons: (1) the Mt. McKinley court did not explain the basis for its apparent rejection of the applicability of the statute, (2) it attempted to distinguish the cases cited for the opposite proposition on the erroneous basis that they all involved suits between insurers and reinsurers, (3) it failed to distinguish or explain away the Anderson holding or address the Clarendon ruling, (4) it invoked Karta Indus. v. Ins. Co. Of Pa., 258 A.D.2d 375, 376, 685 N.Y.S.2d 685, 685 (1st Dep't 1999), even though that court did not address section 3101(f) or the production of policies, and (5) the only other decision the carriers cited, 40 Rector Holdings, LLC v. Travelers Indem. Co., 40 A.D.3d 482, 483, 836 N.Y.S. 173 (1st Dep't 2007), did not address reinsurance at all.

Strangely, the carriers also refer to the Gold Fields decision (Carriers Omnibus2 Memo at 26), even though it allowed some discovery of reinsurance information. 1994 N.Y. Misc. LEXIS 709 at *16-20.

privilege and work product immunity.[60]

The record is quite opaque as to the contents of communications by these carriers addressing reinsurance. Although the carriers assert that these materials are irrelevant principally citing several court decisions so holding in the circumstances of those cases[61] other courts have found such documents to be sufficiently likely to contain pertinent information as to justify mandated production. See, e.g., Fireman's Fund Ins. Co., 284 F.R.D. at 138 (potential rebuttal to carrier defense that insured failed to disclose extent of risk); Imperial Trading Co. v. Travelers Prop. Cas. Co. of Am., 2009 WL 1247122, *4 (E.D. La. May 5, 2009)(relevant to claims of bad faith); Rhone Poulenc Rorer, 1991 WL 237636 at *3. (See n. 60, supra). Presumptivly, then, this category of documents is discoverable to the extent that a carrier has asserted "failure to disclose" defenses or is targeted by bad faith claim.

---

[60] As we have noted, the common-interest rule does not create a separate privilege; rather, it protects the attorney-client privilege in appropriate circumstances. See pp. 12-16, supra.

[61] For example, in Karta the First Department affirmed a trial court's decision, after in camera review, that eight reinsurance documents were irrelevant. 258 A.D.2d at 375, 685 N.Y.S.2d at 685. That decision does not speak to what contents were found in those documents, and the decision to undertake such an in camera review is antithetical to the notion that reinsurance documents are per se irrelevant in a coverage suit. Similarly, although the carriers cite Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 1991 WL 237636 (E.D. Pa. Nov. 7, 1991), that court held only that reinsurance documents were irrelevant to the meaning of policy terms, while acknowledging their relevance to defenses of misrepresentation and non-disclosure, as well as other defenses, and accordingly it ordered production by carriers asserting such defenses. Id. at *3 (discussing National Union Fire Ins. v. Continentl Illinois Corp., 116 F.R.D. 78 (N.D. Ill. 1987); Stonewall Ins. Co. v. National Gypsum Co., 1988 WL 96159 (S.D.N.Y. Sept. 6, 1988); Leksi, Inc. v. Federal Ins. Co., 129 F.R.D. 99 (D.N.J. 1989)).

As for the carriers' reference to the attorney client privilege and work product immunity, they have offered no evidence for that vague assertion, much less a document specific showing, or, apparently, a privilege log. may seek a court ruling. We note that the carriers also refer to the reinsurance documents as "confidential". (Carriers Omnibus2 Memo at 27). Whether any, some or all of the responsive documents deserve this appellation, it is not a basis for non production. There is a governing confidentiality order in this case, and sensitive documents can be produced under its terms.

D. Claims and Underwriting Manuals

In request 49 of the League's third set of requests, it sought "[a]ll Claims Manuals that are or were prepared or in use by You at any time after the earliest date on which You issued an NFL Insurance Policy." In request 23 it demanded "[a]ll Underwriting Manuals prepared or in use by You at any time during the period starting one year prior to the inception date of the first NFL Insurance Policy issued by You and ending one year after the inception date of the last NFL Insurance Policy issued by You." (Cho Omnibus2 Aff., Ex. 1 at 10, 7). According to the League, among all the claimants only TIG has produced claims manuals though the League complains that the carrier has produced only two "such documents" and none of the carriers have produced underwriting manuals although TIG had represented that it would do so. (League Omnibus2 Memo at 31, 32).

The League asserts that both sets of manuals will cast light on the meaning of any disputed policy terms and will also assist in elucidating the carriers' understanding of the scope of the risk that they were insuring and in supporting the League's bad faith claims. (Id. at 31 32 (citing TC Ravenswood, LLC v. Nat'l Union Fire Ins. Co., 2013 WL 3070505, *1 2 (Sup. Ct. N.Y. Cty. June 17, 2013); Mariner's Cove Site B Assocs. v. Travelers Indem. Co., 2005 WL 1075400, *1 (S.D.N.Y. May 2, 2005); Champion Int'l Corp. v. Liberty Mut. Ins. Co., 129 F.R.D. 63, 66 67

(S.D.N.Y. 1989); League Ominibus2 Reply Memo at 20). It also defends the temporal scope of the requests. (Id. at 19 20), although at oral argument it appeared to recede from the written demand, apparently now limiting the requests for the underwriting manuals and claims manuals to the time of the issuance of any policies (for the underwriting manuals) and the time frame commencing with the League's demands for coverage (for the claims manuals). (Tr. 380 83).

The carriers note that "[c]ertain of the Insurers have objected to these Requests . . . ." (Carriers Omnibus2 Memo at 29). On behalf of those carriers they argue (1) that the manuals are not relevant, (2) that the requests are overbroad and "unduly burdensome", (3) that the League is not entitled to extrinsic evidence of policy interpretation since it has identified no provision that is ambiguous, (4) that the requests are not limited to a potentially relevant time period, and (5) that the League seeks "confidential information relating to policyholders other than the NFL parties." (Id.). They also seek to excuse the umbrella and excess carriers from any production of manuals. (Id. at 40 41).

There seems little question that claims and underwriting manuals are generally available for discovery in coverage litigation, but such demands should be properly circumscribed both in time and in subject matter. See, e.g., Certain Underwriters at Lloyd's v. Nat'l R.R. Passenger Corp., 2016 WL 2858815, *10 11 (E.D.N.Y. May 16, 2016); Mariner's Cove Site B Assocs., 2005 WL 1075400, *1; Champion Int'l Corp., 129 F.R.D. at 66. With regard to temporal limitations, the League's written requests are plainly overbroad, but their oral modification properly limits the requests to the underwriting manuals in effect when policies were issued and to the claims manuals in effect when the League proffered its claims to the carriers and thereafter.

Insofar as the carriers object on the basis of undue burden, they fail to make any evidentiary showing, and in

any event it appears that the only meaningful burden argument would be premised on the original demand for "all" manuals, without limitation of subject matter and covering an extremely expansive time period. As noted, we are not enforcing those requests as so worded. The carriers' additional objection based on confidentiality is unexplained we assume that the manuals are guides and do not address specific insureds and if there are legitimate confidentiality concerns, they can be addressed by invocation of the governing confidentiality order.

The record is inadequate, however, to define with meaningful precision which segments of the operative manuals should be produced. To facilitate this process, we note that at a minimum sections addressing the meaning of policy provision pertinent here[62] and provisions governing claims handling procedures in this case are discoverable. To facilitate a complete resolution of this question, the carriers are to provide either a table of contents or the equivalent to the League for its guidance, and the parties will then be expected to confer with a view to reaching consensus as to which segments of the manuals are to be produced. If they cannot agree, the parties may seek resolution by the court.

---

[62] The carriers argue that policy interpretation need not be the subject of discovery because the League has not identified any provisions the meaning of which is in dispute. (Carriers Omnibus2 Memo at 29 (no entitlement to "extrinsic evidence relating to the interpretation of . . . the policies when no party, including the NFL parties, has raised a contract ambiguity and where the NFL Parties have not even identified which policy provisions are in dispute")). The short answer is that in discovery regarding a contract, a party may seek evidence pertaining to the other side's interpretation of the contract before litigating -- typically on summary judgement or at trial -- the meaning of the provision. See, e.g., Certain Underwriters at Lloyd's, 2016 WL 2858815, *10 (citing cases). The slightly longer response is that the carriers have refused in their pleading to identify all of the provisions on which they are relying as defenses to coverage. (See Cho Omnibus2 Aff. Ex. 6 at 18 (Second Affirmative Defense)). The League is not required to read their collective minds.

The final question concerns whether the required production of manuals should include the umbrella and excess carriers. The carriers insist that they should not be included because they are not subject to a bad faith claim. (Carriers League Omnibus Memo at 40 41; see id. at 36). The League, noting that the carriers identify no caselaw in support of their contention that bad faith is the only rationale for requiring production, asserts the contrary, stating also without citing legal authority that "numerous New York courts have held otherwise." (League Omnibus Reply Memo at 20 n.20). We agree that bad faith is not the only basis for production of manuals. If there are provisions in those carriers' manuals that are relevant for other purposes including addressing the interpretation of policy provisions they should be produced. Again, however, the record is insufficient to justify a ruling specifying segments of any of the manuals that should be subject to production. We have specified the procedure for clarifying that question, and expect the parties including the umbrella and excess carriers to follow it.

Conclusion

For the reasons stated, the carriers' motion to compel production of the League's defense and settlement documents is denied, the League's motion for a protective order is granted in part and denied in part, the carriers' omnibus motion is granted in part and denied in part, the carriers' motion to compel production of historical documents is denied without prejudice, and the League's omnibus motion is granted in part and denied in part.

To the extent that privilege logs have not been provided, the parties are to consult with a view to agreeing on a schedule to complete that process, and are to propose such a schedule to the court within two weeks.

Dated: February 26, 2019

/s/

Michael H. Dolinger
Discovery Referee